

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 FOR THE COUNTY OF YAVAPAI

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SANDRA K MARKHAM, CLERK

BY: Jacqueline Marchman

STATE OF ARIZONA,)

Plaintiff,)

vs.)

Case No. V1300CR201080049

JAMES ARTHUR RAY,)

Defendant.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
 BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY THIRTY-EIGHT

APRIL 28, 2011

Camp Verde, Arizona

ORIGINAL

REPORTED BY
 MINA G. HUNT
 AZ CR NO. 50619
 CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
2 FOR THE COUNTY OF YAVAPAI
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4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs.) Case No. V1300CR201080049
7 JAMES ARTHUR RAY,)
8 Defendant)
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1 INDEX

2
3 EXAMINATIONS PAGE
4 WITNESS
5 ROSS DISKIN
6 Direct continued by Ms. Polk 70
7 Voir dire by Mr. Kelly 96
8 Direct continued by Ms. Polk 97
9

8 EXHIBITS ADMITTED

9 Number Page
10 935 105
11 968, 969 115
12 309 122
13 328, 329 123
14 339, 340 125
15 546, 548, 549 125
16 938-942, 950 125
17 541-545, 949 136
18 981 139
19 310, 323 150
20 312, 313, 930-932 226
21
22
23
24
25

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1 Proceedings had before the Honorable

2 WARREN R. DARROW, Judge, taken on Thursday,
3 April 28, 2011, at Yavapai County Superior Court,
4 Division Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.
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PROCEEDINGS

(Proceedings continued outside presence of jury.)

THE COURT: The record will show the presence of Mr. Ray and the attorneys. This is the time set to discuss two exhibits. And I've had a chance to look through all of them. Not sure where to start.

MR. KELLY: Judge, again, I would object. The only exhibit list I have is something that's marked 927, Bates numbers 4369 through 4437. And I believe that's a previously marked exhibit that then was broken down and marked beginning at 949. These are some handwritten notes from the state I have. And beyond that, I don't know their specific numbers.

THE COURT: I was asking Ms. Rybar before, did everybody have exactly what I've looked at so we know what we're talking about rather than shopping through unmarked documents.

MR. KELLY: I do have the documents, but I don't know their specific numbers because they were just to handed me as a stack.

MS. POLK: Aren't they written on the documents?

MR. KELLY: Looks like they're Bates stamped. If that helps.

As to that package of information, Judge, we would move to preclude all of that information. First of all, it's laid out in our pretrial motion in limine. Secondly, I believe there are numerous issues involved with many of those documents.

Instead of addressing them all, I guess I pose the question to Ms. Polk. Does she intend to admit them all, or are there specific documents out of the stack?

THE COURT: That's why I indicated I don't know where to start exactly. If all of this is going to be offered -- Mr. Kelly, you referred to your objections, the written objections. And I indicated I have the folder from that filing back on February 24th, and I think the discussion was really consistent with what the state had suggested. We need to see where the evidence is, and then I need to decide these evidentiary issues in a fuller context. But the objection stated is rather brief, I think.

MR. KELLY: Your Honor --

THE COURT: It's No. 16. The set of papers contained a wide array of JRI seminar materials

that bear no connection to the sweat lodge ceremony. All those papers other than those describing the sweat lodge ceremony are irrelevant and should be excluded. That does capture really the basic objection.

Ms. Polk, what is the relevance to this information that was just apparently found in the room where Mr. Ray had been staying?

MS. POLK: Your Honor, I would need to go through them bit by bit. But, for example, I believe it's Exhibit 927.

THE COURT: Okay. I have the packet just in the order it was given to me. And it starts with 928. 927, what's the description? Spiritual Warrior outline, Bates 4369 to 4437. Okay. Which probably is 4473, I would think. Well, no. It says, 4369 to 4437. That would be a lot of pages. I'm sorry. I don't think I would have that.

MS. POLK: Your Honor, maybe they've been broken further. I'm not sure what the Court has. But if I can go through them -- what exhibit number are you looking at?

THE COURT: You said 927. Isn't that the number you cited to me?

MS. POLK: I did. But it sounds like what

you're looking at is a -- we broke it down further. And if you could take a look at Exhibit 951. That's an exhibit I intend to offer. And that would be Bates stamped 4369 through 4380.

THE COURT: Okay.

MR. KELLY: Judge, I now have identified that marked exhibit and can address some objections if it's appropriate.

THE COURT: All right. I think that's -- go ahead, Mr. Kelly. Ms. Polk can respond.

MR. KELLY: Judge, first of all, when I look through Exhibit 951, it contains handwritten notations, the author of which are undetermined. That would be impermissible hearsay.

On page 2 of the Spiritual Warrior outline, there is some information about dollar amounts, which my understanding is was addressed by this court and precluded.

Most importantly, Judge, as indicated in our pretrial brief, I would submit that this has minimal relevance, if any, to the manslaughter charge. There is admitted into evidence a syntax, which has been discussed, outlining the various times of the various events during the five-day proceeding.

1 There is some reference in here to, as an
2 example, page 4, Hindu's belief: There is only one
3 hindrance to true wealth and fulfillment." Judge,
4 that runs afoul of Rule 610, religious belief of
5 the author of this document.

6 There is language which, I believe, is
7 protected. As an example, just thumbing through
8 here: Opening black bags. Talking about during
9 which you resigned or lost something. That was an
10 expression of your identity during which fears were
11 programmed. That runs afoul during of the First
12 Amendment. One cannot be prosecuted for their
13 statements or beliefs in that regard.

14 Finally, Judge, prior to admission of it
15 all, which we believe it simply has no relevance
16 and should be excluded, we do have a syntax in the
17 evidence. So if the argument is that it outlines
18 the events and the proposed times, I understand.

19 We also have into evidence portions of my
20 client's exact words during those various
21 proceedings. In terms of foundation, simply being
22 discovered in a room which was rented Mr. Ray, does
23 not mean that any of this information was presented
24 during the five-day event.

25 So there seems to be a myriad of

1 objections under the rules of evidence. And we'd
2 ask that the entire document be precluded.

3 THE COURT: Okay.

4 Ms. Polk, talking about 951, I think,
5 Mr. Kelly included some information that's not in
6 there. It's in another exhibit where there is more
7 discussion of costs and the business aspect of it.

8 MR. KELLY: Judge, if I may, I don't want to
9 misstate anything. On page 2 what I believe is
10 951, says, high achievers, \$2,000, FOC expanded.
11 That was my reference.

12 THE COURT: There is another exhibit, though,
13 that has a breakdown of cost. And that's in a
14 different number.

15 Ms. Polk.

16 MS. POLK: Your Honor, first of all, what the
17 Court precluded was evidence of high-pressure sales
18 tactics used by Mr. Ray to sell his event. That's
19 what the Court has precluded. You haven't
20 precluded information pertaining to costs of
21 programs. This document is relevant -- first of
22 all, this is a document that was found inside
23 Mr. Ray's room, inside his briefcase, inside a
24 folder marked "Spiritual Warrior." And it is a
25 briefcase belonging to Mr. Ray.

1 This is different from the syntax. This
2 is the script used by Mr. Ray throughout the week.
3 The jury has heard witnesses describe the various
4 events. This is the script, the order of events,
5 the various topics discussed by Mr. Ray and the
6 actual script used. And we know that because
7 participants have testified about the various
8 events set forth. It's very, very relevant.

9 Mr. Ray has suggested through his
10 attorneys that somehow he just showed up, and yet
11 this is the outline for all of his comments. And
12 there is additional documents as well that have the
13 actual lectures that Mr. Ray gave throughout the
14 week.

15 This is the very evidence that the jury
16 has been hearing about throughout the months of
17 this trial. This is Mr. Ray's script that he
18 followed. And it's very relevant. There is no
19 reason to preclude it. We can establish where it
20 came from. We can establish it was in Mr. Ray's
21 possession. And it is very, very relevant to this
22 trial.

23 MR. KELLY: Your Honor, if I may reply very
24 briefly. If -- and I'm not conceding it's
25 relevant. But if this document were somehow

1 relevant, it needs foundation. If it belongs to
2 Mr. Ray, then I could potentially see its use
3 during his testimony. But how can anyone else
4 connect it up?

5 THE COURT: There is no foundation to say this
6 is the exact script. It's largely a hearsay type
7 document. So especially with Detective Diskin, he
8 would have no knowledge that this is what was used
9 other than if he's listened to the audio recording
10 where similar information is discussed.

11 So I don't see the foundation at all.

12 Ms. Polk.

13 MS. POLK: First of all, the detective has
14 listened to the entire audio, and he can say this
15 does mirror the audio. The foundation is that this
16 is the document found in the room occupied by
17 Mr. Ray. Objections or issues that go to its
18 weight are different from issues that go to its
19 admissibility.

20 The defense can certainly cross-examine
21 and suggest that somehow even though this document
22 is found in Mr. Ray's briefcase, he had nothing to
23 do with it. But that would go to the weight.

24 But to preclude a document that is in
25 Mr. Ray's possession, outlines for the jury the

1 very events that they've been hearing all week --
 2 there is no basis to preclude it. It is relevant.
 3 And suggestions that somehow Mr. Ray doesn't know
 4 about it would go to its weight, not to its
 5 admissibility.

6 This is a search warrant. We have
 7 indicia of occupancy in the room. Mr. Ray is the
 8 only person in that room. It is his briefcase, and
 9 it is a file inside his briefcase that this is
 10 found.

11 Additional relevance, Your Honor, would
 12 be that although the state found the scripts for
 13 the various lectures themselves, noticeably missing
 14 is the script for the for the presweat lodge
 15 briefing. And what the jury will hear testimony is
 16 that that briefing, that there is no script in
 17 Mr. Ray's room.

18 And then when there is a search done at
 19 Carlsbad, noticeably missing are any documents
 20 relating to the Spiritual Warrior 2009 event.
 21 Although, at Carlsbad, they find plenty of
 22 information pertaining to other events that Mr. Ray
 23 has put on over the months, there is very little
 24 there pertaining to Spiritual Warrior 2009,
 25 particularly the script relating to the presweat

1 lodge briefing.

2 And, as the Court knows, when the
 3 detective was doing the interviews, he began to
 4 learn from participants about what Mr. Ray said
 5 before they entered the sweat lodge. And he heard
 6 it from the participants in 2009 as well as the
 7 prior years. Yet, the actual script was nowhere to
 8 be found.

9 As the Court knows, we had a battle then
 10 when we learned from Michael Barber that he had
 11 audiotaped it. It was not at Carlsbad when the
 12 search warrant was done. And upon interviewing
 13 Michael Barber, we learned that he had had the
 14 drive in his position and had given it to James Ray
 15 International the day after the search at Carlsbad.
 16 That's how we knew there was an audio.

17 For months we tried to get the audio. We
 18 had asked the defense for it. They would not turn
 19 it over. Finally, we had a court hearing after
 20 which this Court ruled that the defense had to turn
 21 over that audio to us.

22 We did not get that audio until
 23 January 31st of 2011, less than a month before the
 24 trial started. And at that point the detective
 25 then listened to the entire audio, was able to then

1 verify many of the things that the participants had
 2 said, and, in particular, for the first time, the
 3 state got to hear Mr. Ray's actual words, that
 4 presweat lodge briefing.

5 But, again, his review of the audio
 6 indicates that this is the script that Mr. Ray
 7 followed throughout the week. What's missing is
 8 that briefing. And that briefing there is no
 9 script, as the jury will hear, either in the room
 10 or at Carlsbad.

11 But, again, this is what we're here on.
 12 This is the case that this is about. There is a
 13 foundation for it, and it is relevant.

14 THE COURT: Ms. Polk, I can understand the
 15 circumstances you're talking about, if things are
 16 found or not. But looking through this, the jury
 17 gets things like religious rules and regulations as
 18 a topic.

19 MS. POLK: Your Honor, there has been
 20 testimony from witnesses about the various things
 21 that were said throughout the week. The defense
 22 themselves played an entire audio portion on the
 23 five -- I can't remember what it was called off the
 24 top of my head -- but the five areas of power.
 25 They played a portion of this. There is no basis

1 to preclude it. This is what the seminar was
 2 about.

3 THE COURT: And the jury just looks at this
 4 and makes of it what they will? That's what you're
 5 proposing, Ms. Polk?

6 MS. POLK: Your Honor, what I'm proposing is
 7 that this is what the seminar was about --

8 THE COURT: Answer my question. The jury gets
 9 this, and they get to look through these various
 10 concepts, ideas and beliefs, whatever they're
 11 called, and then the jury does whatever they want
 12 with it? That's the idea? That's the relevance to
 13 the charge?

14 MS. POLK: The relevance is that what the jury
 15 has heard are what the events of the week were
 16 leading up to the mind-set of the victims and the
 17 participants when they enter the sweat lodge. Many
 18 participants have testified this is back-up
 19 material that shows that this is the script that
 20 was the script for the week.

21 THE COURT: Okay. Let's look at day four.
 22 Says "Vision Quest, Day Five." You're saying there
 23 is a page missing in this. You were calling it the
 24 "script," but I see day five talking about the
 25 sweat lodge. You think there is a missing page or

1 something? Because it has the sweat lodge listed
2 in it.

3 MS. POLK: It does, Your Honor. This is the
4 outline. Additional documents are the actual
5 lectures that Mr. Ray gave. And those are marked
6 separately. And we'll be talking about them. What
7 was never recovered is the lecture Mr. Ray gave
8 before entering the sweat lodge, other than the
9 audio that we didn't get until a month and a half
10 before trial.

11 THE COURT: It wasn't litigated until shortly
12 before trial. I think it was litigated in January.
13 The motion was made in January, and it was turned
14 over in January.

15 MS. POLK: The motion was made in December,
16 and then there was time to respond. And then the
17 Court ruled and then time to provide it to the
18 parties. The state had tried to get it from the
19 defense team ahead of time, and we, essentially,
20 were told no.

21 But the relevance is that this is the
22 outline of the week. Additional documents are the
23 actual lectures that Mr. Ray gave, one of which the
24 defense has played the entire lecture for the jury.
25 But missing from those additional lectures is the

1 script for the sweat lodge. It's not in Mr. Ray's
2 room. It's not at Carlsbad, and yet we do have the
3 audio knowing that he gave the lecture.

4 THE COURT: That could well be a relevant
5 point. But it doesn't make just this outline,
6 which may differ in how it's actually presented,
7 relevant. So I'm not going to admit it through --
8 not going to permit its admission through
9 Detective Diskin. It's not going to be admitted.

10 What's the next item? At least in this
11 context. I understand the other context you're
12 bringing up, and that's a whole different question
13 that might have to do with part of this
14 information. But to just have this go through
15 Detective Diskin and be presented to the jury,
16 there is not foundation. But I'm not commenting
17 about that. Well, I am commenting about it, that
18 there is another whole separate issue that could
19 render this admissible that you raised.

20 MR. LI: Your Honor, if I may make a record on
21 that particular issue. The state seized all of
22 Mr. Ray's computers, I believe, on October 14.
23 They have had the hard drives since October 14,
24 2009.

25 As the Court is aware, there are all

1 sorts of metadata that's contained in computers
2 that can show whether things have been deleted or
3 removed or anything like that. They also seized
4 various laptops. I don't know how many
5 computers -- they still have possession of all of
6 these computers. I don't think they've ever done
7 any forensic analysis of it.

8 This accusation that Ms. Polk is making
9 about some sort of spoliation or destruction of
10 evidence is just unfounded.

11 THE COURT: Well, that sounded like a factual
12 issue that's not going to be decided this morning.

13 MR. LI: I understand. I just wanted to let
14 the Court know they have the hard drives.

15 THE COURT: And, Ms. Polk -- we're trying to
16 stay away from language that is beyond what's
17 necessary to convey a legal point.

18 Ms. Polk.

19 MS. POLK: And, Your Honor, just for the
20 record, I want to respond briefly. The documents
21 that I'm talking about are the documents in print.
22 This whole set was in print in Mr. Ray's backpack
23 or his briefcase in his room at Angel Valley. The
24 documents I'm referencing are the documents at
25 Carlsbad that, again, were in print that we were

1 able to seize and take possession of.

2 The reference by Mr. Li to the computers,
3 as Mr. Li well knows, the defense, essentially,
4 never allowed the state to proceed with any
5 forensic review of the computers because they
6 objected on the attorney/client privilege.

7 Perhaps it's an issue for another day.
8 But we attempted over an extended period of time to
9 work with the defense to come up with parameters
10 that would allow us to do searches, and we were
11 never able to reach an agreement. So the state
12 made the decision at that point to move forward
13 with the evidence that we have in front of us.

14 MR. LI: Your Honor, just for the record, we
15 offered to the state that if they were looking for
16 documents related to this -- preindictment. We
17 offered to the state that if they were looking for
18 documents relating to sweat lodges or any of this
19 sort of thing, that we would work together with
20 Mr. Hughes. I wrote a really long email with all
21 sort of suggestions for search word to preclude
22 them inadvertently walking into attorney/client
23 privilege documents. They rejected that offer on
24 multiple occasions.

25 At one point Mr. Hughes wrote me in

1 writing, we're going to search anyway.

2 And I said, I can't stop you. You do so
3 at your own risk.

4 So it's not -- the defense doesn't have
5 the ability to stop the State of Arizona from
6 looking at documents, if that's what it wants to
7 do, on a hard drive. But there are problems that
8 they would have run into in terms of
9 attorney/client privilege.

10 And as a person who has litigated those
11 issues often, I just wanted to make the state aware
12 of that, and if they were going to do it, they do
13 so at their own risk. That's what my letter said.

14 We have a paper record back and forth.
15 It's not critical for this issue, but I just wanted
16 to correct the record. If there is a suggestion
17 there has been some sort of spoliation of evidence,
18 there is no -- they can't -- that's just an
19 accusation without any substance.

20 THE COURT: What other items in this packet,
21 Ms. Polk, are you wanting to offer?

22 MS. POLK: The state would want to offer
23 Exhibit 952.

24 THE COURT: The Dream. Okay.

25 MR. KELLY: Judge, maybe I can see the Bates

1 on that so I can match it up with my --

2 THE COURT: It's Bates 4381 through 4386.

3 MR. KELLY: Judge, this poem entitled "The
4 Dream" -- that's the moon, the judgment, the
5 universe. One night I awaken from a deep, deep,
6 deep sleep. I crawled like a crustacean from a
7 dark and deep water --

8 THE COURT: That's how it starts.

9 MR. KELLY: Again, Judge, this is clearly not
10 relevant unless my client is being prosecuted for
11 his beliefs or his statements.

12 THE COURT: Ms. Polk, again, you're offering
13 this through Detective Diskin. How would this go
14 along with his testimony?

15 MS. POLK: Your Honor, the foundation for all
16 these records, the Court has apparently not
17 accepted. But the foundation, again, is that these
18 are the documents found in the room occupied by
19 Mr. Ray, inside Mr. Ray's briefcase.

20 THE COURT: I think that's an issue we can
21 take care of right now.

22 Mr. Kelly, I think -- there is a
23 stipulation that doesn't agree to admissibility,
24 but you're willing to stipulate right now that all
25 of this was found exactly where Ms. Polk said it

1 was found; correct?

2 MR. KELLY: Absolutely, Judge.

3 THE COURT: And that stipulation is of record.
4 The foundation is there. Where it was found, when
5 it was found, all of that has been stipulated by
6 the defense right now. So that part is taken care
7 of.

8 MS. POLK: I thought I heard the Court say
9 that we didn't lay foundation for the admissibility
10 of 951.

11 THE COURT: I didn't say it's admissible. I
12 just said that the foundation in terms of where it
13 was found, all that, is stipulated.

14 And, Mr. Kelly, if I've overstated it,
15 let me know.

16 MR. KELLY: My -- the state's argument is very
17 oversimplification of foundation. In terms of
18 location as described by Ms. Polk, you bet we'll
19 stipulate to that. We'll stipulate that the cabin
20 was in the sole and exclusive control and
21 possession of Mr. Ray. Those are the facts, Judge.
22 We're not afraid to stipulate to facts.

23 When I talk about other aspects of
24 foundation, as to handwritings on documents,
25 whether or not somehow this was conveyed to the

1 three decedents, those types of foundational
2 issues, we do not waive.

3 THE COURT: That's what I'm saying. The basic
4 foundation you were just talking about, that where
5 they were found with the indicia of occupancy, and
6 the defense is stipulating to that as well --

7 MR. KELLY: Correct.

8 THE COURT: That part is taken care of. But
9 to go back to the exhibit with the outline -- if
10 there are excerpts of the actual presentations that
11 had been admitted, because that would show the
12 mind-set, as we've talked about, or state of mind
13 that actually was delivered testimony, that's one
14 thing.

15 To just have an outline, to what extent
16 was followed is going to depend on Detective Diskin
17 listening to hours and hours and saying, oh, yes.
18 That was all in here -- to get this hearsay
19 document in, that's not acceptable foundation for
20 that. So let's get the term straight.

21 But at least one thing is taken care of
22 now, Ms. Polk. You don't have to be concerned with
23 having a witness say that this was found in a
24 certain place. That's been taken care of.

25 But back to the exhibit we're discussing

1 now, "The Dream: Moon, Judgment, Universe," the
2 relevance of that.

3 MS. POLK: The relevance, again, Your Honor,
4 has been established through participants who have
5 talked about how all the events of the week
6 affected their mind-set when they went inside the
7 sweat lodge. It's the events of all -- the
8 cumulative impact of all the events of the week,
9 that by the time they entered the sweat lodge, they
10 are trusting Mr. Ray. They have been told all week
11 using lectures such as "The Dream" to believe that
12 if they follow what he says, then they can
13 accomplish their dreams, their aspirations. This
14 is one of those lectures. Again, this is found in
15 Mr. Ray's room. The detective listened to the
16 audios, and this is one the lectures that he gave.

17 MR. KELLY: Judge, I'm just stating the
18 obvious. This is a manslaughter case. For the
19 last several weeks, we've been talking about cause
20 of death and heat, confined spaces, the structure
21 of a sweat lodge, factual evidentiary matters
22 resulting in this tragic accident. How this poem
23 entitled "The Dream" relates to that, to me is
24 beyond comprehension.

25 Now, if, as an example, Judge, the

1 government believes that somehow on page 483 --
2 excuse me -- Bates stamp 483 of this document the
3 words are circled, the intense heat drove me
4 backwards, in someone's handwriting. Again, there
5 is no foundation to connect that to Mr. Ray. It's
6 in his room. That's the end of it.

7 Secondly, it's unduly prejudicial, and
8 I'm not conceding it has any probative value in
9 this case. It's just words that are being
10 prosecuted and not the conduct.

11 THE COURT: Ms. Polk, you're indicating
12 Detective Diskin would state under oath that word
13 for word this was delivered?

14 MS. POLK: No. He hasn't made that kind of
15 comparison.

16 THE COURT: Once again, we have, basically,
17 hearsay. What evidence would there be that the
18 people who are stated to be victims in this case
19 actually heard this lecture other than, well, they
20 probably did, or something similar? I'm not
21 accustomed to having testimony of that nature
22 admitted.

23 It seems to me if you actually have the
24 lecture, there is a lot of that evidence that has
25 been admitted, and it may well be the actual

1 lecture itself. But just to say that there was
2 something similar to this and not even knowing if
3 the people who were involved heard it, Ms. Polk.
4 MS. POLK: Your Honor, we do have the actual
5 lecture. That will be the audio that the state
6 will be offering of the entire week through the
7 testimony of Detective Diskin as well. I
8 understand the Court's ruling.

9 The point that is made with these
10 documents is that it is Mr. Ray who has the
11 documents in his room. The suggestion has been
12 made that he just somehow shows up, and these
13 documents belie that suggestion.

14 It's clear that Mr. Ray is what the event
15 is all about and what he says to participants all
16 week. He is the teacher. And what he is saying to
17 them all week leading up to his culminating event,
18 which is this heat endurance challenge, and the
19 state of the mind of the participants, then, as
20 they enter the sweat lodge.

21 THE COURT: And, of course, there have been
22 days and days of testimony about the state of mind
23 of participants.

24 Mr. Kelly.

25 MR. KELLY: Judge, again, I haven't heard any

1 evidence suggesting that my client just showed up
2 during the Spiritual Warrior event in October
3 of 2009. In fact, the evidence is to the contrary.
4 There is an organization, JRI International. At
5 length we discussed the cost of his seminars, his
6 monthly schedule, that these were planned
7 activities. There is a syntax in evidence. I
8 couldn't imagine that this jury is sitting here
9 believing that he just showed up for -- we talked
10 about the cost, \$10,000. He just showed up without
11 a plan. That just simply doesn't make any sense to
12 me.

13 Judge, I can make an avowal, as an
14 example, in regards to this exhibit, "The Dream,"
15 that -- and, again, if Mr. Ray were to testify,
16 foundational issues may be resolved. And I'm not
17 conceding in any fashion relevance in making this
18 statement, nor that these words, if he's going to
19 be prosecuted for it, violates the First Amendment
20 or his religious beliefs.

21 But I'll make an avowal in court that
22 this document was designed to be read after the
23 sweat lodge. So it was never read to the
24 participants is my understanding. And just points
25 out this shotgun approach that we face every

1 morning in this case instead of looking the
2 elements of the crime of manslaughter and what's
3 going to support it versus, essentially, words and
4 beliefs and attitudes and assumptions, extreme
5 assumptions. As an example, an assumption has to
6 be made that the three victims in this case heard
7 any of this information.

8 THE COURT: I just discussed that in
9 particular. I want to return to 610, that rule.
10 That has a very specific purpose. It's to prevent
11 bolstering or enhancing testimony or lessening
12 testimony because of religious belief.

13 Ms. Polk has pointed out -- if that's not
14 the issue, though, there can be discussion
15 testimony about religious beliefs if it's
16 admissible in another context. I want to make that
17 clear.

18 However, this kind of information, it
19 does contain beliefs, ideas, thoughts, what people
20 would consider religious beliefs, I think, many
21 people, and some that people might not agree with
22 at all. And it just calls attention to ideas. And
23 I have a concern with that.

24 But there certainly has been a lot of
25 testimony, really hours, days, of testimony

1 covering this very same topic in many ways,
2 Ms. Polk. But for the same reason this is not
3 something that's been shown that was actually
4 provided to the participants, and it's not going to
5 be admitted through Detective Diskin.

6 Anything else in this packet?

7 MS. POLK: Your Honor, in light of the Court's
8 rule, I won't continue to move for Exhibit 961,
9 962, 963, 964 and 965, all of which are documents
10 found in Mr. Ray's briefcase in his room following
11 the deaths in the sweat lodge. But they have been
12 marked as exhibits.

13 If they become relevant or if I believe I
14 have additional basis for their admissibility, I
15 will raise them again with the Court.

16 The Exhibit 966 is the outline, I
17 believe, for the lecture that the defense has
18 played for the jury. And it is Bates stamped 4435,
19 4436 and 4437. I would ask if the defense is going
20 to object to that one as well? That's titled "The
21 Seven Stages of Spiritual Evolution."

22 THE COURT: That's 966. And I have that.

23 MR. KELLY: Judge, I would renew all of my
24 previous objections to the admissibility of this
25 document. And I disagree that it's somehow

1 connected with other evidence in this case. I do
2 not agree with that.

3 MS. POLK: Judge, I will not attempt to admit
4 it. I was just asking if the defense intended to
5 object to that one as well.

6 THE COURT: Mr. Kelly is indicating yes. Is
7 there further record on that, Ms. Polk?

8 MS. POLK: No, Your Honor.

9 THE COURT: My prior rulings apply to 966 as
10 well. Prior rulings on this packet.

11 MS. POLK: The one document that the state
12 would intend to move for admission is Exhibit 960,
13 which is the Samurai Game rules.

14 THE COURT: What's the Bates number, please?

15 MS. POLK: Those are Bates 4410 through 4413.
16 And, again, another document found in Mr. Ray's
17 position.

18 MR. KELLY: Judge, again there's -- I know
19 we've heard too much testimony in regards to the
20 Samurai Game, in my opinion. But this document
21 lacks foundation in that we do not know whether the
22 script outlined in 960 was followed exactly, or
23 that these were the rules, whether my client --
24 excuse me -- placed the -- there is some
25 handwritten information on the first page. Whether

1 he's the author of the circling of the word
2 "domeo." And, of course, it's entirely hearsay.

3 So, again, based on foundation -- I'll
4 point out, just as an example, potentially how
5 misleading it could be. Under "attire," completely
6 covered in very heavy bamboo armor or steel helmet,
7 heavy sword, dagger. Apparently -- I've heard some
8 actual testimony regarding the attire. But it did
9 not mirror that.

10 So this, again, from a 403 analysis,
11 presents the possibility of extreme prejudice and
12 given the testimony thus far in this case has
13 minimal relevance.

14 THE COURT: Ms. Polk.

15 MS. POLK: I believe the Court understands the
16 relevance of the Samurai Game because we've had
17 many participants testify about it. This is the
18 document that lays out the game itself. The topic
19 Samurai Game has been the subject of this trial,
20 both in terms of the mind-set of participants as
21 they entered Mr. Ray's sweat lodge, and then also
22 the subject of cross-examination by the defense as
23 they have suggested or actually told the jury that
24 this is the same game played across corporate
25 America and across the military, which is not true.

1 But these are the rules for the game as Mr. Ray
2 played them and, again, found in his briefcase in
3 his room.

4 MR. KELLY: Judge, in regards to foundation,
5 we've not told the jury anything. We've asked
6 questions. Witnesses provide facts. We did ask
7 the question, are you aware that the Samurai Game
8 is played by AT&T, as an example. I doubt that
9 Detective Diskin knows or can lay the foundation to
10 make a comparison based on this document.

11 And when I talk about foundation, between
12 what AT&T or Disney or JRI International used or
13 interpreted as the Samurai Game.

14 THE COURT: Ms. Polk.

15 MS. POLK: I would just remind the Court and
16 counsel that in Mr. Li's opening statement, he did
17 tell the jury the Samurai Game was played in
18 corporate America.

19 MR. LI: There is a record of what I said.
20 And I did not say that. I said it's similar to
21 many corporate games all over America. You just
22 can look at the record.

23 THE COURT: Did you use the word "similar"?
24 Because when I made a written ruling on that very
25 issue of whether or not there is going to be a

1 subtrial on the Samurai Game, I think Ms. Polk
2 indicated in her pleadings it was really a
3 suggestion that this is an identical game.

4 MR. LI: No. I'll go look at the record.

5 THE COURT: Anyway, that's all in the written
6 ruling, and how I viewed that.

7 MR. LI: I don't think I have the foundation.
8 I didn't even know that it had been played in the
9 Army or what have you. I think the only point I
10 would have been making is that this is the kind of
11 game that people play in corporate seminars all
12 over. But there is a written record. We can look
13 at it.

14 THE COURT: Ms. Polk.

15 MS. POLK: Your Honor, to ask questions of
16 witnesses, counsel has to have a good-faith basis
17 for the information. They have asked several
18 witnesses, did you know that this is a game played
19 in the military? And I just heard Mr. Li state
20 that he doesn't even know if it's played in the
21 military.

22 To go back to the basis for the
23 admissibility for this document, the Samurai Game
24 has been the subject of the trial. And these are
25 the rules found in Mr. Ray's possession. The

1 foundation -- the Court has already -- understands
2 I won't reargue that.

3 This is a document setting out the rules
4 at the seminar where this game is played. Any
5 objection, any suggestion that somehow there was a
6 variance in the rules, would go to the weight and
7 not to the admissibility. This document should be
8 admitted.

9 THE COURT: It would be admitted, essentially
10 saying this is Mr. Ray or JRI's rules and this is
11 what was followed. And then whether it was or not
12 would just have to be determined by the jury as
13 they try to sort out what was said by witnesses,
14 what's on the recording and what's in here.

15 And just by common sense, these are the
16 rules. It is in somewhat of an outline form. The
17 problem with any outline is when people make
18 outlines, whether it's a lecture or an argument,
19 sometimes the argument or lecture doesn't track the
20 outline. It doesn't.

21 So what would be significant are the
22 hours and days of testimony about the Samurai Game
23 and what was actually delivered, not what would
24 appear in the outline. Really the same principles
25 apply.

1 It would not be admitted through
2 Detective Diskin.

3 Mr. Li, if you had a point -- you were
4 standing there.

5 MR. LI: I just didn't know at the time of the
6 opening statement that -- that's just something we
7 learned subsequently.

8 MS. POLK: Your Honor, the Court has said not
9 through Detective Diskin. I'm not clear, then,
10 what witness the Court would allow this through.

11 THE COURT: Mr. Kelly wasn't revealing
12 anything, mind you. It's just if there were
13 testimony by certain people that had knowledge of
14 things, then this might be pertinent information,
15 for example.

16 MR. KELLY: Judge, I have -- I would ask you
17 to -- I have an issue, I suppose, I'd like to
18 discuss with the Court. It relates to --

19 MS. POLK: I'm sorry, Judge. There was one
20 more.

21 THE COURT: Go ahead, Ms. Polk.

22 MS. POLK: Exhibit 928, which is the agenda
23 for Mr. Ray, again found in his possession.

24 THE COURT: I'm just going to ask Ms. Polk.
25 I see you're talking about the agenda

1 that starts back on Wednesday, September 30, and
2 goes through?

3 MS. POLK: Correct.

4 THE COURT: That is 928. And the relevance?

5 MR. KELLY: Excuse me, Judge. I need a Bates
6 stamp.

7 THE COURT: It's 4357 through 4360.

8 MS. POLK: Your Honor, the relevance is this
9 is the agenda for Mr. Ray for the week and
10 indicates when he arrived, when he was to depart.
11 The testimony in this trial has been that he had a
12 personal assistant, that every moment of the
13 Spiritual Warrior event was scripted, every moment
14 planned. And this is Mr. Ray's agenda -- the
15 defendant in this case. This is where he was to be
16 at any given time. Again found in his possession.

17 THE COURT: Mr. Kelly.

18 MR. KELLY: Judge, there is a huge foundation
19 problem. We have no idea as to whether or not this
20 hearsay document reflects my client's actual
21 activities between September 30th and Sunday,
22 October 11. Simply an assumption on the part of
23 the state.

24 There has been -- to the extent that each
25 of these witnesses testified as to their personal

1 contact with Mr. Ray, the state identified the
2 specific date and the approximate time of each of
3 those contacts leading up to the sweat lodge.
4 That's what this jury needs to know, not whether
5 Taylor will be riding with you on Wednesday,
6 September 30th.

7 We don't know the author of the document.
8 We don't know whether Mr. Ray followed it. Simply
9 no foundation. So I would object. Again, still
10 have difficulty understanding the relevance.

11 I mean, no one in this case is arguing,
12 again, that Mr. Ray and JRI was not a company that
13 had a schedule and charged money, planned this
14 event, was responsible for having people there to
15 do certain things throughout the course. We heard
16 from Melinda Martin in that regard. It's not in
17 dispute. I don't understand the relevance. It is
18 a hearsay document.

19 It can mislead the jury because, as an
20 example, I just point this out on page 1:
21 9:00 a.m. to 12:00 P.M., WWS hike. If hike goes
22 longer, driver will wait.

23 So we have no idea whether -- I think we
24 heard some testimony that there may have been a
25 hike scheduled for certain members of the Spiritual

1 Warrior. I could stand corrected on that. I
2 recall that. But the length of time and whether
3 the driver had to wait, et cetera, would be pure
4 speculation.

5 So, again, Judge, I would object on the
6 basis of foundation.

7 THE COURT: Ms. Polk, anything further on this
8 exhibit?

9 MS. POLK: No, Your Honor.

10 THE COURT: I understand the relevance of
11 showing Mr. Ray's involvement in various
12 activities, level of preparation and those things.
13 Potential relevance again. I don't comment on
14 evidence, just I understand that argument. But I'm
15 just going to say on this, this has very, very
16 clear 403 issues. I don't even need to elaborate.
17 They're apparent. Again, also not knowing if this
18 is what actually happened, it's not admissible.

19 MS. POLK: Your Honor, I understand the
20 Court's ruling. I just want to respond to the
21 issue of 403, because that issue has come up
22 frequently throughout this trial. The objection by
23 the defense, that information is prejudicial.

24 The standard for information being so
25 prejudicial that it won't be admitted is that it is

1 so prejudicial that it would inflame the senses of
2 the jury and cause them to render an improper
3 verdict for an improper reason.

4 An example of evidence that is so
5 prejudicial that it shouldn't come in would be
6 examples that a defendant had committed a burglary
7 in a completely unrelated case. The cases talk
8 about conduct that has nothing to do with the event
9 in the trial and is so prejudicial that it would
10 cause the jury to render an improper verdict for an
11 improper reason.

12 Information that comes in in a trial is
13 prejudicial by definition. It points to
14 defendant's guilt. The state offers information
15 because it is prejudicial. And I just want to
16 respond because frequently at sidebar, frequently
17 when there are objections, the continuous objection
18 is that it is prejudicial.

19 I just want to make a record of what that
20 standard is. Information that is so prejudicial
21 that it causes the jury to render an improper
22 verdict for an improper reason.

23 All the information is prejudicial or the
24 state would not be offering it to show that Mr. Ray
25 is guilty of the crimes as charged.

1 THE COURT: Ms. Polk, let's look at October 9.
2 Check in Enchantment spa. Lymphatic drain. Herbal
3 detox. Beautician massage. Gentleman's facial.
4 That's -- the relevance?

5 MS. POLK: Your Honor, witnesses in the trial
6 have testified that Mr. Ray said that this sweat
7 lodge ceremony would be healthy for them, that
8 after undergoing this intense heat and this intense
9 humidity, their skin would be baby soft.

10 The fact that Mr. Ray on Friday,
11 October 9, the day after the event, had scheduled
12 for himself a lymphatic drain, an herbal detox and
13 an ayurvedic shiro. I'm not even sure what that
14 is. That may be a person.

15 That is relevant. He is causing these
16 participants to trust him, to believe him, to
17 ignore their bodies' signs and symptoms of heat
18 illness, eventually heat stroke in the case of the
19 three victims, or hyperthermia, believing that he
20 knows what he is doing and what they are going to
21 undergo is good for them and that it is safe to
22 ignore their bodies' signs that they are dying.

23 And yet, leading them, telling them that
24 this is going to be good for their skin, the day
25 after he has scheduled for himself facials and

1 drains and deep tissue massage, it all is relevant.
2 It all is relevant.

3 THE COURT: Mr. Kelly.

4 MR. KELLY: Judge, Article IV of the Arizona
5 Rules of Evidence, Rule 403, is in black and white
6 in words. The Court can read it. I'm going to
7 state again, it's over simplified the rule. It
8 does not say that the prejudice has to be so
9 substantial that it may result in -- I think she
10 said an unfair verdict or erroneous verdict.

11 It says: Substantially outweighed by the
12 danger of unfair prejudice, confusion of the
13 issues, misleading the jury or by considerations of
14 undue delay, waste of time or needless presentation
15 of cumulative evidence. 403 is much, much more
16 broad than that described by the State of Arizona.

17 And, Judge, the fact that my client went
18 and got a massage, that's totally irrelevant to any
19 issue in a manslaughter case. And I just think of
20 this example, Judge. We heard testimony from one
21 witness that she stayed at the Ritz and ate a
22 lobster dinner. Maybe she got a massage. Maybe
23 she got a facial. Who knows?

24 What's important is whether or not the
25 State of Arizona can prove the elements of the

1 crime of manslaughter beyond a reasonable doubt.
2 If my client got a massage or if he ate lobster, if
3 he ate a hot dog, really has no relevance.

4 THE COURT: I look at this itinerary full of
5 personal information, some of which may or may
6 not -- personal appointments, personal matters,
7 some of which may or may not have actually taken
8 place. And I'm well aware of the 403 standard.

9 As I've indicated before, it's something
10 that's done very rapidly often through a trial.
11 There is that weighing. And there is a favoring in
12 bringing evidence in if relevant evidence comes in.
13 That's generally the view. It has to be
14 substantially outweighed by the danger of unfair
15 prejudice, undue delay, or undue prejudice, and
16 then confusion of the issues, all those factors in
17 403. So I'm well aware of that.

18 But to look at this information,
19 Ms. Polk, and say it's just apparent that after you
20 do these other things, you wouldn't want to go and
21 do this, and say that that really has probative
22 value to the issues in this case, I find pursuant
23 to 403 it does not have sufficient probative value.

24 MS. POLK: Your Honor, I understand the
25 Court's ruling. I was not rearguing this exhibit.

1 I was responding in general to this continuous
2 objection that something is prejudicial, so,
3 therefore, should not come in.

4 Your Honor, in my arguments to the Court,
5 I have mistakenly written on an exhibit. I had
6 thought it was my own. So it is Exhibit 413. And
7 up in the corner, I have written across the top
8 "Exhibit 918." I think we have to address this
9 somehow.

10 THE COURT: Okay.

11 MS. POLK: I'm self-reporting that I've
12 written on an exhibit.

13 THE COURT: We can take care of that. Thank
14 you. Just make sure it gets tabbed and we don't
15 lose track of it.

16 Mr. Kelly.

17 MR. KELLY: Judge, I have an issue for
18 Detective Diskin's testimony. It relates to what I
19 believe to be the presentation of the evidence by
20 the state, as well at exhibits 932 and 933, which
21 were the photographs of the wallet found in the
22 cabin that we discussed yesterday.

23 And, Judge, here's the problem: You've
24 seen and heard evidence, of course, that the sweat
25 lodge ceremony ended in the late afternoon on

1 October 8. You've seen photographs. I forgot the
2 particular one that shows my client present during
3 the EMS -- or when the EMS folks arrived and he's
4 in some shorts and a white T-shirt.

5 Then he is placed in a patrol vehicle
6 until approximately 2:00 a.m. in the morning. When
7 he's released from the patrol vehicle, he makes a
8 telephone call to his attorney, who advises him not
9 to speak with the police.

10 He goes to his cabin. There is a
11 detective or some type of law enforcement personnel
12 who is maintaining that particular premises for
13 evidentiary purposes which connects with
14 Detective Diskin's testimony yesterday. If you
15 recall, they were going to get a search warrant to
16 search his residence.

17 So given the fact he could not enter and
18 remove his personal items from the residence, and
19 acting on the advice of his attorney, he left.
20 Between October 9, 2009, until the day he was
21 arrested, his attorneys and the State of Arizona
22 had continuous contact, extensive contact,
23 communicating back and forth.

24 On October 3rd during the evening or
25 early morning hours of October 4th, Mr. Ray flew to

1 Arizona. He was in my office for about seven
2 hours. He stood there and waited to be arrested by
3 Lieutenant Rhodes and Detective Diskin.

4 There was a promise that he would not be
5 "perp walked" for the media's sensationalism of his
6 arrest. He was brought over here. Instead of
7 taking him to the sally port, he was let out with
8 Detective Diskin so they, in fact, could show the
9 walk to the press.

10 That -- those are the facts, Judge. My
11 client has never shown any evidence of flight or
12 escape. In fact, it's the opposite. There was a
13 pretrial agreement, a motion filed by the state of
14 Arizona that we would not mention the perp walk.
15 And that's fine. I don't see its relevance to
16 manslaughter.

17 But also to mislead this jury into
18 believing that because his personal items are in
19 his room on October 9 and he leaves without them
20 may also impermissibly imply to this jury that
21 somehow he was feeling consciousness of guilt. And
22 that's simply not true.

23 So, again, I would renew my objection to
24 the admission of the photograph which contains his
25 wallet, because it may be used for an impermissible

1 purpose. And I would ask this Court to admonish
2 the State of Arizona from making any type of
3 statement or allude to any fact which would imply
4 that somehow Mr. Ray was fleeing on October 9.

5 THE COURT: Ms. Polk.

6 MS. POLK: Your Honor, may I have a moment
7 with the detective?

8 THE COURT: Yes.

9 MS. POLK: Your Honor, the relevance to
10 showing the jury the room that Mr. Ray stayed in
11 and, again, indicia of occupancy, is to establish,
12 first of all, his presence. As we talked about
13 yesterday, the defense cannot stipulate away
14 relevant evidence at the trial. This shows his
15 presence at the event.

16 Second is the Court has made some initial
17 rulings on documents. But should the opportunity
18 arise later, then we would be establishing moving
19 to admit those documents. So establishing that
20 there is a briefcase with documents in his room
21 that the deputies seize is appropriate through the
22 testimony of Detective Diskin.

23 And then, Your Honor, I want to clear up
24 some of the -- that recitation of facts. The state
25 disagrees with what Mr. Kelly just said. As the

1 jury has heard, Mr. Ray, first of all, told
2 participants who could get up and leave, that they
3 should leave as first responders were arriving.

4 At some point. Mr. Ray himself leaves
5 the scene and he goes back to the room. Mr. Kelly
6 told the Court that the defendant was taken into --
7 was detained and not allowed to go back to the
8 room. In fact, he went back to the room after the
9 first responders came at some point. The sick were
10 taken care of.

11 The detectives begin their investigation,
12 and then the detectives began asking, well, where
13 is Mr. Ray? Then Mr. Hamilton leads one of the
14 officers to the room where Mr. Ray is in the room.
15 And he's taking a shower or -- he's either taking a
16 shower or eating a sandwich. I can't remember
17 which one.

18 Mr. Ray was back in his room at that
19 time -- back in his room. I carefully did not ask
20 Mr. Hamilton when he testified about that
21 information.

22 The detective or the officer then asked
23 Mr. Ray to come back down to the scene, and Mr. Ray
24 is put in a vehicle. He telephones his attorney at
25 that point then tells the detectives that he is not

1 willing to make any statements. So it's not after
2 he is let out of the vehicle but before that he
3 calls his attorney.

4 And then the state would agree that
5 Mr. Ray at that point is not given access to his
6 room. The scene is cordoned off and he is not
7 given access.

8 We are not offering this information to
9 suggest flight. And, as the Court knows, I've been
10 very careful not to ask questions, again, of
11 Mr. Hamilton about where Mr. Ray was. I haven't
12 asked any of the witnesses at the scene about
13 seeing Mr. Ray with detectives, about seeing him in
14 the back of the patrol vehicle. We haven't asked
15 the Hamiltons about the next day where Mr. Ray was.

16 When the Hamiltons -- in fact, I didn't
17 even ask the Hamiltons that night in the dining
18 room -- the jury heard testimony from Mrs. Hamilton
19 how she finds herself taking care of participants
20 that night, assisting with the medical responders,
21 assisting with the detectives, rounding people up,
22 trying to help them help gather information, make
23 sure the sick were taken care of. Nobody has asked
24 any of these witnesses where Mr. Ray was throughout
25 that.

1 We are not offering this information to
2 make any of the inferences that Mr. Kelly has just
3 argued to the Court. It's being offered simply to
4 show this is the room Mr. Ray stayed in, and these
5 are his possessions and it's indicia of occupancy
6 and that these documents were seized.

7 THE COURT: You brought up the topic of
8 postincident conduct. And there was a bench
9 conference about that. There are instances --
10 times when postincident conduct can be admissible,
11 but it's fairly tricky.

12 If there is a clear showing of flight,
13 for example. If there is a clear showing of
14 concealing evidence, those kinds of things. Those
15 are admissible. But to just have other conduct --
16 and you do get into 403 considerations suggesting,
17 well, this is how someone would act.

18 That's -- I think if you look at the
19 cases -- and I've attempted to look at cases
20 before -- that can be a problem. So you've
21 indicated you've stayed away from that, but that's,
22 basically, the holding.

23 You've indicated before, though,
24 Ms. Polk, there were some questions that did come
25 up where you were going to get into some of that,

1 and there was a bench conference on that.

2 I'm just really trying to see the
3 relevance. You can show where he stayed and,
4 again, just a completely uncontested kind of issue.
5 Not the kind of thing that I see arise in these
6 situations where it comes up in the context of
7 gruesome photographs where defense wants to
8 stipulate away a gruesome photograph.

9 The state has a right to present the case
10 and show elements. To bring this in, this
11 information in, to show that this is where he was
12 staying -- well, in terms of a narrative about what
13 was done, the investigation has been questioned,
14 that narrative, Ms. Polk, I think is something that
15 can be relayed in a general sense. Where he was
16 staying, that there was a search warrant, that kind
17 of information, just really tells what happened.
18 That's just part of the case. So if there is going
19 to be narrative testimony on that, I don't see an
20 issue.

21 To actually bring in, though, documents
22 to just sort through and say, here are all these
23 different things, that goes, again, far beyond what
24 you're asking to prove or you say you need to
25 prove.

1 MS. POLK: And, Your Honor, I don't intend
2 to -- in light of the Court's rulings, I was not
3 going to bring out the documents themselves. All
4 I'm going to do is show the photograph of the room
5 where he stayed, the room that was searched, the
6 wallet, indicating the indicia of occupancy, and
7 then the briefcase showing that -- the briefcase
8 that's seized. And it shows a folder that says
9 "Spiritual Warrior."

10 THE COURT: Could I see the picture that has
11 the wallet. Because I saw the two yesterday where
12 it just had a number of cards that were apparent.

13 Mr. Kelly, you've addressed the issue of
14 the wallet -- address all of this, these four
15 exhibits and suggested accompanying testimony.

16 MR. KELLY: Judge, what I would suggest as
17 perhaps proper testimony would be to admit exhibits
18 312, 313, 930 and 931. And for your information,
19 Judge, that includes the briefcase that has the
20 Spiritual Warrior information along with testimony
21 that the room was secured and not accessible by
22 anyone.

23 We don't have to make reference to
24 Mr. Ray. Again, this was preserved throughout the
25 course of the investigation until the search

1 warrant was obtained.

2 I would object to 932, which is the
3 wallet. And, Judge, again, it is not disputed that
4 that was his cabin, that that briefcase was his.
5 The indicia of occupancy, we're not arguing that.
6 There will be no misleading of the jury. All this
7 does is potentially create prejudice to the jury
8 because they're going to ask the question, why
9 would the man leave his wallet?

10 And if that's the case, then I would
11 argue that I'm entitled -- that door has been
12 opened, and I'm entitled to go through the
13 extensive conversations that took place between
14 October until his arrest in February, that he
15 voluntarily showed up in my office, that
16 Lieutenant Rhodes and Detective Diskin made a
17 promise he would not be perp walked, sheriff
18 walked, overruled them, and he was.

19 We have got to complete the story. I
20 think the way out of it is admit the documents.
21 They show occupancy. They show the documents that
22 existed for purposes of the Spiritual Warrior
23 seminar. But his wallet has minimal, if any,
24 relevance when there is no issue regarding the
25 occupancy of -- I think it's cabin seven.

1 I would add to that, Judge, that we've
2 had a witness testify -- I think it was Debbie
3 Mercer. I could be wrong -- that he was staying in
4 the cabin.

5 THE COURT: If it's made clear to the jury he
6 was not permitted to go back to the room, doesn't
7 that clear all that up?

8 MR. KELLY: Except for the wallet. That's
9 what I'm saying --

10 THE COURT: Even the wallet. He was not
11 permitted to go back in. It seems to me if that's
12 clarified that --

13 Ms. Polk, what are the three -- the
14 admitted exhibits? I want to get those done right
15 now if there is not going to be a dispute about.
16 Could you recite those, please.

17 MS. POLK: Exhibit 930, 313, 312 and 931.

18 THE COURT: Okay. So those will be admitted.
19 They can be offered.

20 The wallet. What's that number?

21 MS. POLK: 932.

22 THE COURT: Okay. 932. Question about that.

23 I'm saying, Mr. Kelly, seems to me with
24 the background, it can be shown.

25 If the background isn't given, Ms. Polk,

1 I would be inclined to agree with Mr. Kelly that
2 that can be something that's inquired into. If
3 there's some suggestion that somebody left a
4 wallet, therefore it was contemplating flight or
5 something like that. But I would -- again,
6 omitting or redacting the identifying information,
7 just the wallet itself, as long as it's not brought
8 in with some misimpression, then I would admit
9 that.

10 MR. KELLY: And, Judge, two things. First of
11 all, I'd ask that the personal identifying
12 information be redacted with some type of pen on
13 the actual court exhibit.

14 And, secondly, we are not -- and I don't
15 want my statements to be misconstrued -- waiving
16 our constitutional rights in reference to my
17 client's conversation with his attorney, referenced
18 to indication of rights, any postsweat lodge
19 activity of my client that we've objected to. That
20 doesn't constitute a waiver.

21 What I'm speaking about is if these
22 exhibits are coming in, I think out of fairness, it
23 ought to be brought up by the detective that that
24 was a secured location as part of an investigation
25 and no one could access.

1 THE COURT: I think Ms. Polk would do that.

2 MS. POLK: Your Honor, we will. And I will
3 leave it to Mr. Kelly to figure out how he would
4 like that exhibit redacted.

5 THE COURT: Are you suggesting at this time
6 that there is some implication of commenting on
7 Sixth Amendment rights just through this exhibit?
8 Because if there is, I certainly want to address
9 that.

10 MR. KELLY: No. Fifth and sixth. I didn't
11 want the impression that somehow we opened the door
12 to postsweat lodge activity.

13 MR. LI: If we can have one moment, Your
14 Honor.

15 MR. KELLY: Judge, this is critical because
16 obviously commenting on one's right to counsel
17 would be an instantaneous mistrial. So, please. I
18 appreciate your patience.

19 As I understand it now, the course of the
20 presentation of the evidence will be from
21 Detective Diskin that he arrived on October 9 at
22 8:30 in the morning. Prior to his arrival,
23 Mr. Ray's room was secured until a search warrant
24 was to be obtained on the 9th.

25 Once the search warrant was obtained and

1 the room was searched, these items were located in
2 the room. That is what I understand to be the sum
3 total of the evidence and not any reference to the
4 postsweat lodge activities of my client on
5 October 8th from 5:30 -- or let's say 7:00 o'clock
6 at night, whenever those photographs -- those EMS
7 photographs that he appears in were taken until
8 this search. Because then that would implicate his
9 Fifth Amendment rights.

10 The fact, using an example, that he was
11 detained in the back of a patrol vehicle, the
12 fact -- you've already ruled on it -- that he went
13 to his room and took a shower. I'm assuming none
14 of that's coming in. We're not waiving our
15 objection in that regard.

16 THE COURT: You didn't consider that as such,
17 did you, Ms. Polk?

18 MS. POLK: No, Your Honor.

19 MR. KELLY: Thank you.

20 THE COURT: Ms. Polk.

21 MS. POLK: Your Honor, there are a couple more
22 issues, but they can wait. There is another issue
23 with respect to Detective Diskin's testimony and
24 what are the factors and if he learned more having
25 interviewed witnesses and what is going into his

1 decision-making process as to what to test and what
2 not to test. I think we can wait. I don't think
3 I'll get there before the noon hour, if the Court
4 wants to start.

5 And then there is another issue with
6 Dr. Kent, who would testify about 2008, that I
7 wanted to bring up with the Court at some
8 appropriate point.

9 MR. KELLY: Judge, we discussed this at
10 sidebar. Again, I think it's improper. And I'm
11 trying to think of an example the detective gave.

12 Why didn't you seize that wood?

13 And his response was it wasn't used in
14 the fire.

15 And that's incorrect. The correct
16 response is, based on my investigation, my belief
17 was --

18 THE COURT: And that was done. There was a
19 sidebar, and the questions were phrased in that
20 fashion.

21 MR. KELLY: Right. And so I'm just
22 emphasizing that again. We don't have an objection
23 to the detective testifying about his course of
24 conduct in collecting and preserving evidence and
25 the information that he based it on.

1 What we have an objection is when he
2 starts talking about clear hearsay, so-and-so told
3 me, or, alternatively, making these conclusionary
4 remarks that somehow that's determinative of a fact
5 in issue in this case.

6 So I'm not sure if that clarifies
7 Ms. Polk's comment. But that's the basis of my
8 objection. He's the case agent, and he did a lot
9 of stuff. He had to rely on other people's work in
10 making those decisions. And we understand that.

11 MS. POLK: No. That's not the issue I was
12 addressing at all. And I can take it up after
13 lunch if the Court wants.

14 But what the jury has heard so far is
15 just based on what the Mercers were telling him.
16 That began to form the direction that his
17 investigation would take. We are going to get when
18 we go through with the jury everything Detective
19 Diskin did.

20 Then as he learns more and more,
21 particularly finds out more and more about what
22 happens in the prior years, then he begins --
23 focuses more and more on Mr. Ray's conduct.

24 And relevant to that discussion, then,
25 there will be some questions asked toward the end

1 of his testimony. Part and parcel of that, Your
2 Honor, will be -- we can argue this later. But the
3 Court had ruled precluding further testimony about
4 what happened in prior years.

5 And I'd like to request that the Court
6 allow the state to bring in Dr. Kent, who is a
7 witness from 2008, particularly in light of what
8 the Court said yesterday. You mentioned there had
9 been no testimony that any of the events in prior
10 years were life-threatening.

11 I'll just make an offer of proof that
12 Dr. Kent would testify that he was inside the sweat
13 lodge in 2008, that he recognized what was going on
14 around him were the signs and symptoms of
15 heat-related illnesses that would result in heat
16 stroke, that he left the sweat lodge early in 2008.

17 He describes what he saw outside, how he
18 assisted participants outside for what he will
19 describe as heat-related illnesses. He is a doctor
20 from Canada who is an anesthesiologist.

21 He then tells the staff for Mr. Ray, as
22 well as Dream Team members on the outside, that
23 what was going on was life-threatening, that it was
24 very dangerous, that this is how people die.

25 And then in the end of the ceremony, it's

1 Dr. Kent who looked back inside and he saw two
2 people still inside unconscious. He brought them
3 out. He treated them. And he believes that he
4 saved their lives.

5 This is not information that was known to
6 the state back when we did prior hearings. This is
7 an individual who came forward after the trial had
8 begun. We interviewed him. We immediately
9 disclosed him and the audio of his interview on
10 March 14th. And we added him to our witness list
11 on March 14th.

12 We had intended to call him as a witness
13 when we began talking about the prior events and we
14 had started with the Mercers. And after hearing
15 from the Mercers and then a motion by the defense,
16 the Court had ruled no more testimony will come in.

17 Particularly in light of the Court's
18 statement yesterday that you had heard no
19 information from prior years that this conduct was
20 life-threatening, this is clearly relevant
21 testimony on that point. And with respect to 2008,
22 Dr. Kent will testify that six people should have
23 gone to the hospital.

24 THE COURT: I talked about and ruled that --
25 there was a question whether the testimony already

1 admitted at this point would stay in the trial
2 absent additional expert testimony. I also talked
3 about just having cumulative testimony when the
4 witnesses so far have laid out in such detail the
5 various things they have observed.

6 But once again, this witness -- and the
7 first thing came to my mind, where was this witness
8 at the 404(b) stage of this? Because I've always
9 said the evidence I have seen, there was only the
10 Daniel P. evidence that had any type of actual
11 medical care involved, medical involvement. And
12 there just was nothing else.

13 But this Dr. Kent was disclosed two weeks
14 after opening statement. Apparently was watching
15 the proceedings or something?

16 MS. POLK: I don't know if he was watching,
17 Your Honor, or read about it in the paper. But
18 this is obviously somebody the state didn't know
19 about at the time of the prior hearing.

20 When he contacted Detective Diskin,
21 Detective Diskin returned the call, did the
22 interview. We immediately disclosed it to the
23 defense and the audio. The defense has had this
24 since March 14, which would be more than -- that's
25 a month and a half. And they've known about it.

1 And the state intended to call him. We
2 had intended from the time we included him on the
3 witness list to call him, along with many other
4 witnesses pertaining to the prior years.

5 And then last week the Court issued your
6 ruling precluding further testimony -- allowing the
7 testimony to stand but precluding further
8 testimony. And at that point we understood we
9 couldn't bring in Dr. Kent or others.

10 But when the Court made the reference
11 yesterday to never having heard testimony that what
12 was going on was life-threatening, it's obvious
13 this information is not cumulative because it is
14 different from the Mercers. This is a doctor, an
15 anesthesiologist, who clearly recognizes various
16 stages of unconsciousness, who was there in 2008,
17 who has been fully disclosed to the defense, and
18 who would be relevant in this trial. And, again,
19 this all goes back to the issue of causation, which
20 the defense has made an issue in the case.

21 THE COURT: I've said a number of times about
22 the lack of evidence going to life-threatening
23 conditions. It wasn't just recently.

24 When did you first learn about Dr. Kent?

25 MR. KELLY: Judge --

1 THE COURT: I want to know this date,
2 Mr. Kelly. I want to hear what you have to say.
3 But I want Ms. Polk to tell me. She indicated
4 disclosure on the 14th.

5 But I am sorry. I didn't catch when you
6 learned about him.

7 MS. POLK: Right around that time. He called
8 the detective. We were in trial. The detective
9 called him back. We immediately amended the
10 witness list and then got the interview of Dr. Kent
11 disclosed to the defense. Dr. Kent told the
12 detective that he had sent an email -- tried to
13 send an email to the sheriff's office back when the
14 events happened in 2009. But that email was never
15 received. We never knew about him.

16 And then on the 14th he called, or
17 sometime shortly before then, contacted the
18 sheriff's office. And then Detective Diskin called
19 him back. We immediately disclosed it. It's been
20 more than six weeks now. It's been, I guess, seven
21 weeks that the defense has now known about
22 Dr. Kent.

23 And, Your Honor, we intended to call him.
24 We intended to call many witnesses about 2008,
25 2007, because people have different perspectives.

1 But obviously this doctor has a unique perspective
2 because he's a doctor and specifically will testify
3 that what he saw was life-threatening, what he saw
4 was dangerous, that he believes he saved two lives,
5 that he assisted six others, and that he told the
6 Dream Team members and staff while the event was
7 going on in 2008 that this was life-threatening and
8 dangerous and that people could die.

9 THE COURT: Mr. Kelly.

10 MR. KELLY: Judge, Dr. Kent was on the roster
11 of participants, which the government has had in
12 its possession since 2009. This is not a surprise
13 witness. They knew he existed. Detective Diskin
14 knew he existed as one of the participants in '09.

15 Ms. Do -- and then apparently what
16 happens, as I understand, is this gentleman is
17 watching In Session TV and then decides after the
18 beginning of trial to provide an opinion in regards
19 to what he observed in 2008. I think that's what
20 the government is saying.

21 So now they're saying, lo and behold,
22 after listening to Mr. Li's opening, we need this
23 guy in listening to your rulings.

24 So in the middle of this trial, without a
25 Terrazas hearing, which they had the opportunity

1 in 2010 to conduct, and given due diligence by the
2 State of Arizona, they could have interviewed this
3 fellow. If that were his opinion before he watched
4 the TV coverage, they could have presented him
5 during that lengthy one-week hearing.

6 And now they want to jump over the legal
7 requirements under Arizona law that this court hear
8 all testimony from this purported doctor we have no
9 background information on, who, if he did
10 participate in 2008, if he is a medical doctor --
11 keep in mind, he didn't call EMS. He didn't render
12 any type of aid. That lends highly doubtful
13 credibility to his opinion that now, some three
14 years later, he decides that he wants to become a
15 witness in this case.

16 The bottom line, Judge, is we have
17 disclosure violations. He appears with this
18 purported opinion after Mr. Li's opening statement
19 where we outlined our defense, presents significant
20 due-process considerations for Mr. Ray in receiving
21 a fair trial.

22 And before this court could ever even
23 begin to consider whether his admissibility --
24 excuse me -- his testimony is admissible, there has
25 to be a Terrazas hearing. And that Terrazas

1 hearing, Judge, is not limited to Dr. Kent.

2 If it is his opinion that six or eight
3 people somehow suffered some type of medical
4 distress in 2008, then we need to hear from those
5 six or eight people. In addition to those six or
6 eight people, we need to hear from the other
7 participants in 2008 before you could make a
8 well-reasoned decision as to admissibility under
9 Terrazas alone.

10 Judge, if somehow now the government is
11 saying over halfway through this trial that they're
12 going to present the testimony of an undisclosed
13 witness who apparently is going to provide an
14 opinion which makes him an expert, they have not
15 complied with 15.6. They've not complied with any
16 aspect of Rule 15. And they've known of his
17 existence since 2009. That's what we're confronted
18 with.

19 And I would submit, Judge, if that's the
20 case, if there is any credible or honest
21 consideration of this request today, then this
22 trial has to be continued until these legal matters
23 are resolved. And this jury -- we don't want that.
24 We want a jury verdict. And we want this jury to
25 decide that verdict. And we don't want to start

1 again. And this is just out of hand.

2 THE COURT: Pardon my gesturing here. But
3 we're going to start the trial again here in a
4 moment.

5 I'll say this: There certainly are very
6 large disclosure concerns. But I don't know that
7 this is a 404(b) Terrazas kind of issue with this
8 kind of testimony. Mr. Kelly, I'm not convinced
9 that it is. I raise that. It certainly would seem
10 that would have been the time in that context that
11 it would have been discussed. But --

12 MS. POLK: Your Honor, may I respond to the
13 disclosure issue?

14 THE COURT: Very quickly, Ms. Polk, because
15 I'm not going to decide this now.

16 MS. POLK: I understand, Your Honor. There
17 has been no disclosure violation. Dr. Kent was
18 listed on the 2008 participant list, but not as a
19 doctor, just as a person named David Kent. The
20 detective is going to testify that he interviewed
21 somewhere in the neighborhood of 70 to 100 people,
22 directly interviewed them in this case, including
23 people from prior years, but David Kent was not one
24 of them.

25 There is no disclosure violation because

1 the state did not have any information from
2 Dr. Kent, or David Kent, until March 12, when --
3 that's a Saturday. And we just pulled up the email
4 on March 12, Saturday, at 11:17 p.m.

5 Dr. Kent sent an email saying that he had
6 become aware that there was a trial going on and
7 that he puts, then, the information that I've
8 relayed to the Court or an outline of it. Saturday
9 at 11:17 p.m., he sent it to the web mail for the
10 Yavapai County Sheriff's Office.

11 Monday morning it was picked up by one of
12 the secretaries there. It was provided to the
13 state. We disclosed it that same morning. That
14 same day, Monday, when we picked up the email from
15 Dr. Kent on the 14th, we amended the witness list
16 on the 14th. And then when Detective Diskin
17 interviewed him, which was immediately in that
18 area, we provided the audio to the defense.

19 This is another witness the defense chose
20 not to interview. We have noticed him as a witness
21 from the 14th forward, which is the moment when we
22 learned about him. And there has been no
23 disclosure violation. The defense has had seven
24 weeks to talk to Dr. Kent if they wanted to.
25 They've been on notice for seven weeks.

1 We intend to call him, and we had
2 intended to call him when we began the portion of
3 the trial dealing with what happened in the prior
4 years.

5 THE COURT: Thank you.

6 Heidi, we're going to bring the jury in.

7 (Proceedings continued in the presence of
8 jury.)

9 THE COURT: The record will reflect the
10 presence of Mr. Ray, the attorneys, the jury.
11 Detective Diskin is on the witness stand.

12 Ms. Polk.

13 MS. POLK: Thank you, your Honor.

14 DIRECT EXAMINATION (Continued)

15 BY MS. POLK:

16 Q. Detective, when we left off yesterday
17 afternoon, we had just gone through the series of
18 photographs first from the outside and then from
19 the inside.

20 Do you recall that?

21 A. I do.

22 Q. Would you explain to the jury, did you
23 take photographs, an initial set of photographs, of
24 the sweat lodge as you saw it?

25 A. Yes.

1 Q. And then did you -- you've testified that
2 you identified items of evidence and you marked
3 them?

4 A. Yes.

5 Q. And then you testified that you took an
6 additional set of photographs of those item markers
7 in place before removing the items?

8 A. Yes.

9 Q. Did you also take some photographs of the
10 sweat lodge after moving some things around?

11 A. Yes.

12 Q. Explain that to the jury.

13 A. Well, I wanted to get pictures of what
14 the sweat lodge looked like from the inside when it
15 was closed or when it was going on. When we
16 arrived, of course, the site had been ripped up.
17 We then put down the sides so that Josh Nelson, our
18 evidence tech, could get photographs of what the
19 sweat lodge would have looked like from the inside
20 during the sweat lodge ceremony.

21 Q. After taking that set of photographs, did
22 you then -- what did you do next?

23 A. I believe we just continued to mark
24 evidence.

25 Q. And ultimately did you seize items of

1 evidence?

2 A. Yes.

3 Q. What happened to the items after you
4 seized them?

5 A. They were placed into our evidence.

6 Q. Explain to the jury the process that you
7 and the detectives and the technician used to track
8 what it is you're seizing and then what you do with
9 it.

10 A. Well, in a case like this when we're
11 technically serving a search warrant, we use what's
12 called a "search warrant supplement" to document
13 the evidence. We document who found it, where it
14 was, what time it was found, that sort of thing.
15 And it's all documented on the log.

16 Then after we're done with the scene and
17 have collected all of our evidence, then the
18 evidence goes to our evidence building where it
19 remains until it's needed.

20 Q. You talked about a log. What log are you
21 referring to?

22 A. The log is what's called a "search
23 warrant supplement," where all the items of
24 evidence are documented with an item number so that
25 we know where that -- what that item is, where it

1 **came from. There is an additional evidence invoice**
 2 **that's filled out that's in addition to the search**
 3 **warrant supplement, which is, essentially, a mirror**
 4 **image of what the search warrant supplement is.**

5 **Q.** And once an item gets a number, does that
 6 number stay with that item?

7 **A. Yes.**

8 **Q.** Is that number unique to that item?

9 **A. Yes.**

10 **Q.** You just referenced the Yavapai County
 11 Sheriff's Office evidence storage facility. Tell
 12 the jury what that is.

13 **A. When this case first started, the**
 14 **evidence facility was in our Prescott office. But**
 15 **since then, we've opened a new evidence facility in**
 16 **Prescott Valley over by the fairground.**

17 **Q.** Is that where all evidence seized by any
 18 employee of the Yavapai County Sheriff's Office
 19 would be stored?

20 **A. Yes.**

21 **Q.** Is it a secure facility?

22 **A. It is.**

23 **Q.** Is there staff there that runs that
 24 facility?

25 **A. Yes.**

1 **Q.** Explain to the jury what the process is
 2 if, then, you or perhaps an attorney wants to see
 3 an item seized for a case. How do you do that?

4 **A. Generally, like, if we want a copy of**
 5 **something that's in evidence, either a document or**
 6 **an audio recording, we would send an email to**
 7 **evidence requesting that item. They would make a**
 8 **copy and have it forwarded to whoever is requesting**
 9 **it. If it's a different kind of item, a big item,**
 10 **we would actually have to go there to view, like,**
 11 **the logs or the rocks, in this case, then we would**
 12 **make an appointment to go view those items.**

13 **Q.** Can anybody just walk in and start
 14 looking at evidence?

15 **A. No.**

16 **Q.** What is the process, then, to actually be
 17 able to look at an item?

18 **A. It just depends on what item you're**
 19 **looking at. If it's physical evidence that they**
 20 **can't just make a copy of, if you have to actually**
 21 **see that piece of evidence, then we would make an**
 22 **appointment with our evidence personnel.**

23 **Q.** And then they would have a process that
 24 would allow them to maintain chain of custody over
 25 that item?

1 **A. Yes.**

2 **Q.** Moving on now to the sweat lodge that was
 3 at Angel Valley, the physical structure at
 4 Angel Valley, on October 9th of 2009, when you
 5 first saw it, there has been some questions by the
 6 defense about whether the pit that the heated rocks
 7 were put in, whether or not that was off center.

8 Do you recall those questions?

9 **A. I do.**

10 **Q.** And you were inside the sweat lodge?

11 **A. Yes.**

12 **Q.** Did you ever observe whether or not
 13 the -- did you observe the appearance of the pit?

14 **A. I observed the pit. Yes.**

15 **Q.** What did you personally observe about it?

16 **A. I thought it was in the center. I was in**
 17 **the sweat lodge for about two hours just processing**
 18 **the scene and collecting evidence, and I didn't**
 19 **notice that the pit was off center.**

20 **Q.** If it is off center, is it off center by
 21 very much?

22 **A. Not enough to really -- that I could**
 23 **notice when I was in there.**

24 **Q.** Is the sweat lodge or was the sweat lodge
 25 itself a perfect circle?

1 **A. It didn't appear to be. It was close**
 2 **but --**

3 **Q.** And do you know whether or not it's
 4 possible to center an item in something that is not
 5 a perfect circle?

6 **A. I wouldn't know how you could do that.**
 7 **It would seem to be difficult.**

8 **Q.** So, for example, if I draw on the easel
 9 something that is maybe not quite circle, slightly
 10 oval, could you center something in something that
 11 is not perfectly round so that it is the equal
 12 distance from every edge?

13 **A. No, you could not.**

14 **Q.** Again, Detective, is there another
 15 employee of the Yavapai County Sheriff's Office
 16 that was out to the scene that diagramed and
 17 measured everything?

18 **A. Yes.**

19 **Q.** Did you seize the entire sweat lodge
 20 structure?

21 **A. No.**

22 **Q.** I'm going to put up on the overhead
 23 Exhibit 916. Since I ask you these questions,
 24 first of all, just remind the jury what 916 is.

25 **A. It's a photo of what's inside the sweat**

1 lodge after we had marked some of the items that we
2 wanted to seize as evidence.

3 Q. Can you tell the jury where the
4 photographer would have been standing in terms of
5 the sweat lodge and the entrance.

6 A. This picture would have been taken near
7 the entrance.

8 Q. And the drag marks that you've testified
9 about before -- do you see them on here?

10 A. I do.

11 Q. Would you show the jury. And the door
12 would be where? If you could just put a pink line
13 in the area where the door would be.

14 A. The picture wasn't taken from the door
15 because you can tell it's closer to the pit than
16 the door.

17 Q. When you arrived at Angel Valley on
18 October 9, 2009, was that sweat lodge in the same
19 condition that it was when two people died and
20 others were taken ill?

21 A. No.

22 MR. KELLY: Objection. Lack of foundation.

23 THE COURT: Sustained.

24 Q. BY MS. POLK: Detective, as the case
25 agent in this case, can you testify as to whether

1 or not the sweat lodge was in the same condition
2 when you arrived and processed the crime scene on
3 October 9 that it was at the time that Mr. Ray
4 conducted a ceremony and people fell ill and two
5 people died?

6 A. It was not the same condition.

7 Q. And when emergency responders arrived at
8 the scene, around sometime after 5:00 o'clock on
9 October 8, 2009, was the sweat lodge in the same
10 condition then that it had been when people fell
11 ill and two people died?

12 MR. KELLY: Your Honor, objection. He wasn't
13 present. Lack of foundation.

14 THE COURT: Ms. Hunt, will you read the
15 question, please.

16 (Record read.)

17 THE COURT: Sustained.

18 Q. BY MS. POLK: Detective, as the case
19 agent, did you talk to and review any statements
20 made by detectives in your office who were at the
21 scene on October 8, 2009, sometime after
22 5:00 o'clock?

23 A. Yes.

24 Q. And in the course of your investigation,
25 did you have the opportunity to interview many

1 witnesses and review evidence?

2 A. Yes.

3 Q. And based on your review of the case,
4 your review of all the witness statements, and your
5 review of the evidence, have you formed a belief as
6 to whether or not the sweat lodge was in the same
7 condition when -- was in the same condition after
8 emergency responders had responded and taken care
9 of the ill that it was when people fell sick during
10 Mr. Ray's sweat lodge ceremony?

11 A. No.

12 Q. Have you formed an opinion?

13 A. Yes.

14 Q. What is your opinion?

15 A. My opinion is that it wasn't the same.

16 Q. Explain that to the jury.

17 A. Well, for instance, in this photograph,
18 you can see that it's light inside the sweat lodge.
19 Several people testified during the sweat lodge
20 ceremony it was dark because it was completely
21 covered.

22 Obviously when we arrived, it wasn't
23 covered. And our initial responders talked about
24 the sides had already been opened up where they had
25 pulled participants out. So the condition of the

1 sweat lodge was different than it was during the
2 sweat lodge ceremony.

3 Q. And did you learn in the course of your
4 investigation whether the HazMat team from the fire
5 department had also been inside the sweat lodge?

6 A. Yes.

7 Q. Did you learn whether or not they made
8 have altered in any way the coverings or let
9 additional air out?

10 MR. KELLY: Judge, I'm going to object to
11 foundation. It's requesting hearsay responses.

12 THE COURT: Sustained as to foundation.

13 Q. BY MS. POLK: Were you able to review
14 what the HazMat team had done at the scene?

15 A. I recall that the HazMat team was on
16 scene and bringing equipment inside the sweat
17 lodge. I don't recall if they manipulated the
18 sweat lodge in any way.

19 Q. And you testified yesterday that the
20 HazMat team had tested and found no evidence of
21 carbon monoxide?

22 MR. KELLY: Your Honor, objection.

23 MS. POLK: Your Honor, that was his testimony
24 yesterday. I'm just laying foundation.

25 MR. KELLY: May I approach?

1 THE COURT: Yes.

2 (Sidebar conference.)

3 THE COURT: Mr. Kelly.

4 MR. KELLY: Judge, again, I thought that the
5 question along these lines was going to be as a
6 result of reviewing information, what did you do
7 next. What this witness is now testifying to is
8 what other people's opinions were, what their
9 observations were, what their statements were,
10 which is not only hearsay but it deprives my
11 ability to cross-examine the truthfulness of that
12 information. And it's a significant problem.

13 If somehow HazMat individuals are
14 relevant in this trial, then the state should call
15 them as a witness so that I can cross-examine the
16 accuracy of their conclusions.

17 And so if -- you know -- we discussed
18 this yesterday and today and now again at a
19 sidebar. But I hate to keep objecting in front of
20 the jury. And the questions are always, what did
21 you learn from the HazMat guy? What did the HazMat
22 guy tell you? What did the HazMat guy determine?
23 All those are highly improper because I can't
24 cross-examine that information.

25 MS. POLK: First of all, Judge, I haven't

1 asked those questions. What I'm doing is laying
2 the foundation for why he did not seize the entire
3 sweat lodge. I am asking him about his belief.
4 I'm not asking him about the opinions or beliefs of
5 other witnesses. So the objections that Mr. Kelly
6 said, I haven't asked those questions.

7 If he wants to object to the form of the
8 question, he can certainly do that. What I'm
9 establishing is laying the foundation that this
10 detective, as the case agent, made some decisions
11 about what items to seize.

12 And as the Court knows, the defense has
13 already made it an issue for the jury that the
14 entire sweat lodge was not taken.

15 MR. KELLY: Judge, the question would be if
16 that's the purpose, the proper question is why did
17 you not seize the sweat lodge entire.

18 MS. POLK: Judge, I --

19 MR. KELLY: We go through hearsay statements.
20 And I summarized using Hazmat as an example of this
21 entire line of questioning. I believe I have
22 accurately summarized the forms of the question
23 which I have had to object to. Did someone tell
24 you something? Objection. Foundation, hearsay.
25 Did someone -- based on their written report, did

1 you draw a conclusion? It's requesting an opinion
2 based on hearsay response. Objection, foundation.
3 There was even a question, was the sweat lodge in
4 the same condition at 5:00 o'clock in the afternoon
5 on October 8th as you saw it on October 9th, and he
6 didn't see it on October 8th. I had to object to
7 that.

8 And this is an improper line of
9 questioning. And it creates prejudice to my client
10 when I have to object.

11 MS. POLK: Your Honor, if Mr. Kelly wants to
12 object, he needs to object. It's not hearsay. I'm
13 not offering it to prove the truth of the matter
14 asserted. And I don't need Mr. Kelly to tell me
15 how to question this witness. This witness can
16 testify as to the reasons based on his
17 investigation that he does certain things. I'm not
18 offering it to prove the truth of any of it. It's
19 his reasons for acting as he does.

20 THE COURT: It just has to be very clear,
21 though, that's all it is. It's his belief, and so
22 he moved on to something else. And some of the
23 questions, Ms. Polk, they are coming in where it's
24 just relaying the HazMat conclusions, which -- it
25 is. It's just hearsay.

1 So it's very awkward to be giving
2 limiting instructions, this isn't to prove. This
3 is why the officer is taking the next step.

4 Mr. Kelly, that kind of evidence is
5 proper, but how to convey that, it can be a
6 difficult thing.

7 And I thought there was kind of this
8 understanding it was made clear he was operating on
9 information. It was made clear he doesn't know
10 whether it's true or not, but that's what he was
11 operating on on why he did something. It seems
12 that's appropriate.

13 MR. KELLY: I thought we were going to be
14 talking about his conduct and his decisions and not
15 what a HazMat guy learned.

16 THE COURT: But then the only way you can know
17 what he's doing, there has to be some context why
18 he does that, Mr. Kelly. And so we're trying to
19 work this out. I mean, I can give a limiting
20 instruction each time if I need to do that and just
21 say this isn't offered for the truth. It's only
22 offered to show why the officer took the next step
23 based on his own belief or something. Ms. Polk can
24 ask the question in that fashion it seems.

25 MR. KELLY: Judge, I don't understand why --

1 if the purpose is to determine why this detective
2 operated or conducted an investigation in a
3 particular fashion, why not just ask him instead of
4 asking what he learned from the HazMat guy, what he
5 learned from some other detective? Why can't they
6 just say why didn't you take the whole tarp and
7 avoid this entire area that violates my right of
8 cross -- my client's right of cross-examination and
9 confrontation. Because the HazMat guy is not here.
10 That's the problem.

11 THE COURT: If he were to be asked in that
12 open fashion, it would be, why did you do this?
13 Well, there was no carbon monoxide or something.
14 He's going to say that. What's the difference as
15 long as it's made clear he's operating on somebody
16 else's information and he doesn't know whether it's
17 true or not? That's what the jury has to
18 understand.

19 MR. KELLY: The difference is the form of the
20 question and the response is attributing
21 credibility to the HazMat conclusion that I cannot
22 confront.

23 THE COURT: I agree. I know that --

24 MR. KELLY: Versus just simply, well, I had an
25 opinion that there was no carbon monoxide and what

1 I reviewed. Those are two completely different
2 messages sent to the jury. Now Detective Diskin is
3 vouching for the credibility of the HazMat guy.
4 That's the big difference.

5 MS. POLK: The detective is not vouching.
6 And, again, I have the right to question the
7 witness in the way I want to. I don't need
8 Mr. Kelly to tell me how to question the witness.

9 If the questions are proper, then he gets
10 to answer them. If Mr. Kelly thinks they are not
11 proper, he can object. This witness has
12 established that these are based on his
13 conclusions. These are the reasons why he acts as
14 he has done. Defense has made this detective's
15 investigation front and center in this trial, and
16 this detective is going to explain why he did what
17 he did.

18 MR. KELLY: Judge, I am not trying to tell the
19 state how to ask a question. I'm asking that the
20 Court instruct the state to follow the rules of
21 evidence and ask open-ended questions on direct
22 examination which do not require a hearsay
23 response. Those are rules of evidence, Judge.

24 THE COURT: And there can come a time if there
25 is just what appears to be a willful -- you know --

1 violation of the rules of evidence and bringing in
2 improper testimony, then that's --

3 MS. POLK: This is not improper testimony.

4 THE COURT: If it's hearsay, Ms. Polk, it is.
5 If it's getting the HazMat's hearsay answer in
6 there, it is.

7 How is it anything else?

8 MS. POLK: Information from HazMat is already
9 in the trial. And that is foundational for why
10 he's making a decision the sweat lodge is not in
11 the same condition. Obviously, it's not in the
12 same condition it was when people died in it. And
13 he's going to explain that in his decision not to
14 seize the sweat lodge.

15 THE COURT: What form is the HazMat evidence
16 in? I've heard --

17 MS. POLK: It's been testified by doctors.
18 It's been -- defense has cross-examined witnesses
19 about it. This detective testified about it
20 yesterday already. It was part of the radio
21 traffic. It's been -- it was eliminated that
22 9-1-1, the CD with the 9-1-1, and all the radio
23 traffic is in evidence where they report that
24 HazMat has found no carbon monoxide. It's
25 everywhere throughout the trial.

1 I don't need to talk about carbon
2 monoxide. But this witness can explain the reasons
3 why he takes the steps that he does. And it's not
4 offered to prove the truth of the matter asserted
5 when he talks about what those items are. It's
6 offered to prove why the investigation took the
7 course that it did.

8 THE COURT: That has to be conveyed clearly
9 through the questioning. And it can't be leading.
10 And we'll just have to go question by question.

11 (End of sidebar conference.)

12 THE COURT: Ms. Polk.

13 Q. BY MS. POLK: Detective, did you consider
14 before making the decision -- did you seize the
15 entire sweat lodge?

16 A. No.

17 Q. And did you consider before making that
18 decision not to seize it, did you consider the
19 possibility of trying to reconstruct with that
20 structure what occurred when people fell ill and
21 two people died and one person died 10 days later?

22 A. Yes.

23 Q. What did you consider?

24 A. We kind of had a little meeting with the
25 other detectives and our supervisor that were there

1 to figure out what we were going to do with the
2 sweat lodge. First of all, the sweat lodge had
3 been changed from how it was when this incident
4 happened. The sides had been ripped up. There is
5 all kinds of materials that were no longer there
6 because they had taken blankets off and used them
7 with participants. So it wasn't exactly the same
8 structure as it was when this happened.

9 Q. Did you consider the quality of the air
10 itself?

11 A. Yes.

12 Q. And did you consider whether or not you'd
13 be able to duplicate or replicate the quality of
14 the air itself?

15 A. Yes.

16 Q. And what did you conclude?

17 A. Well, it had been opened up by the first
18 responders and also the folks that were dragging
19 Kirby and James out. So the air that was in the
20 sweat lodge when people became sick was no longer
21 present.

22 Q. Did you consider whether or not you could
23 try to duplicate the conditions to recreate the
24 quality of the air?

25 A. Yes.

1 Q. And what did you consider?

2 A. We would -- you would have to somehow
3 reconstruct the sweat lodge exactly how it was and
4 then probably find 56 volunteers to sit in there to
5 determine the level of carbon dioxide and things
6 like that.

7 We had no idea how hot it was in there,
8 so we wouldn't know how hot to heat it. We didn't
9 know the amount of participants that were inside
10 for each round. We knew some had come out. We
11 didn't know how long the door was open between
12 rounds, which would make a huge difference on the
13 air quality on the inside.

14 We had witness statements and estimates,
15 but there is really no way to reconstruct it
16 exactly the way it was because there's just too
17 many variables.

18 Q. And you mentioned the number of
19 participants. Do you know whether the breathing by
20 participants affected or would affect the air
21 quality?

22 A. Yes.

23 MR. KELLY: Your Honor, objection. Lack of
24 foundation.

25 THE COURT: Sustained.

1 MS. POLK: Your Honor, that was just a yes or
2 no question to lay foundation.

3 THE COURT: It was. This instance, though, I
4 sustained. There hasn't been foundation provided
5 at this time.

6 Q. BY MS. POLK: Do you have any basis,
7 Detective, for forming an opinion as to what
8 factors affect air quality in terms of a person
9 breathing?

10 A. Yes.

11 Q. And what is the basis -- without telling
12 me your opinion, what would be your basis?

13 A. When people breathe, they breathe in
14 oxygen and breathe out carbon dioxide.

15 Q. And do you have any basis of knowledge
16 for whether or not the rate of breathing differs
17 from person to person?

18 A. I would assume so.

19 Q. And do you know -- do you have a basis
20 for forming an opinion as to whether or not that
21 rate, that respiration rate, would affect what
22 would be in the environment or in the air?

23 MR. KELLY: Your Honor, I'm going to renew my
24 objection. Well beyond the scope of this witness's
25 qualification.

1 THE COURT: Sustained.

2 Q. BY MS. POLK: Do you know -- Detective,
3 based on your investigation, were you able to
4 determine whether Kirby Brown stopped breathing
5 while she was still inside the sweat lodge?

6 MR. KELLY: Your Honor, objection. Lack of
7 foundation.

8 THE COURT: Sustained.

9 MS. POLK: Your Honor, I asked him if he was
10 able to form a conclusion as to when -- as to
11 whether or not Ms. Brown stopped breathing inside
12 the sweat lodge.

13 THE COURT: Again, in this instance, I'm
14 sustaining the objection based on lack of
15 foundation at this point.

16 Q. BY MS. POLK: After reviewing -- after
17 you had conducted your complete investigation, and
18 after your review of interviews of doctors and of
19 witnesses, and reviewing all the evidence in this
20 case, were you able to form a basis to determine
21 whether Kirby Brown stopped breathing inside the
22 sweat lodge?

23 MR. KELLY: Your Honor, objection. Lack of
24 foundation.

25 THE COURT: Sustained.

1 Q. BY MS. POLK: Detective, any other
2 factors -- did you consider any other factors in
3 deciding whether or not to seize the entire sweat
4 lodge structure?

5 A. Yes.

6 Q. And what else did you consider?

7 A. **What I was thinking at the time was that**
8 **this could be some type of toxin or some chemical**
9 **that was in there. Or at this point I knew,**
10 **basically, what James Ray had told participants**
11 **prior to going in, that they would have this**
12 **altered state, that they would -- you know -- feel**
13 **like they're going to die.**

14 And so we didn't know what was going to
15 cause that. I didn't know at that time that heat
16 could cause that. So we thought there may have
17 been some type of drug introduced, an hallucinogen
18 or something, that was going to create these
19 symptoms that Mr. Ray talked about before
20 participants went into the sweat lodge.

21 So we wanted -- or I wanted to sample
22 everything that we could within the sweat lodge, so
23 if there was a toxin inside the sweat lodge, that
24 we might be able to test for that toxin on the
25 different samples that we took.

1 Q. Did you consider whether or not you could
2 transport that sweat lodge that we've described --
3 in terms of size for the jury, did you consider --
4 consider whether or not you could transport it
5 intact without taking it down?

6 A. Yes.

7 Q. And could you?

8 A. No.

9 Q. And why not?

10 A. **For several reasons. Just the size of**
11 **it. It's 23 feet in diameter as it sits. But you**
12 **can't just pick up the whole sweat lodge and move**
13 **it. The posts for the sweat lodge that hold the**
14 **sweat lodge up are buried into the ground and bent**
15 **over. And that's what provides the support for the**
16 **sweat lodge. And so you'd have to dig up each**
17 **pole. And once you did that, the sweat lodge would**
18 **open up and become one giant flat disk.**

19 Q. Did you consider disassembling it and
20 taking all of it, seizing all of it?

21 A. Yes.

22 Q. What was your decision?

23 A. **Our decision was that it would be better**
24 **and more efficient to sample everything we could**
25 **within the sweat lodge. Also if we took it apart,**

1 **we couldn't really capture the exact layering. I**
2 **wanted to be able to see the layering of different**
3 **materials. I decided that we would cut squares out**
4 **from different locations within the sweat lodge so**
5 **we can preserve the different layering, how thick**
6 **it was, all the materials used, that sort of thing.**

7 Q. Did you determine -- Detective, did you
8 make a decision as to whether or not there was any
9 evidentiary value in seizing the entire structure?

10 A. Yes.

11 Q. And what did you determine?

12 A. **Well, we didn't really determine there**
13 **was no evidentiary value in seizing the whole**
14 **thing. It was minimal. We couldn't recreate what**
15 **it was, to begin with. We felt it would be better**
16 **and more efficient to sample all the different**
17 **parts of the sweat lodge and all the different**
18 **materials than to seize the entire sweat lodge.**

19 Q. Do you -- as a detective, and members of
20 your profession, if you had a scene where a house
21 was set on fire and caused the death of a
22 participant, would you seize the house?

23 A. No.

24 MR. KELLY: I'm going to object. Calls for
25 speculation. Lack of foundation.

1 THE COURT: Overruled.

2 Q. BY MS. POLK: You do not. And why not?

3 MR. KELLY: Your Honor, objection. Relevance.

4 THE COURT: Overruled.

5 MR. KELLY: Judge, may I voir dire the witness
6 with one question?

7 THE COURT: You may.

8 VOIR DIRE EXAMINATION

9 BY MR. KELLY:

10 Q. Detective, this was your first homicide
11 investigation; correct?

12 A. No.

13 Q. Did you tell Ms. Do in the summer of 2010
14 that this was your first active homicide
15 investigation?

16 A. **No. What I told her was this was the**
17 **first homicide investigation in which I was the**
18 **case agent.**

19 Q. I stand corrected.

20 This is the first homicide investigation
21 where you were the case agent; correct?

22 A. Yes.

23 Q. The case agent is the one ultimately
24 making decisions as to what to preserve for
25 evidence; correct?

1 **A. The case agent supervisor would be**
 2 **ultimately responsible. The case agent generally**
 3 **is the one responsible for making the decisions.**

4 **Q.** You have never been involved in a
 5 homicide investigation which resulted in the
 6 burning down of a house, as a case agent; correct?

7 **A. That's correct.**

8 MR. KELLY: Your Honor, I would renew my
 9 objection.

10 THE COURT: Sustained as to foundation.

11 DIRECT EXAMINATION (Continued)

12 BY MS. POLK:

13 **Q.** Detective, you testified yesterday about
 14 the various training that you have received over
 15 the years. Based on your training, as well as your
 16 involvement in the Arizona Homicide Detectives
 17 Association, are you familiar with whether or not
 18 the practice is to seize a house where an arson has
 19 caused the death of a participant?

20 MR. KELLY: Your Honor, objection. Asked and
 21 answered, foundation.

22 THE COURT: Overruled.

23 You may answer that.

24 THE WITNESS: Can you say that one more time.

25 **Q.** BY MS. POLK: My question is whether or

1 not based on your training you know whether or not
 2 it is the practice to seize an entire house where
 3 an arson has caused the death of a participant?

4 **A. I've never heard of that happening unless**
 5 **it's a travel trailer or something that's mobile.**

6 **Q.** In that situation, what is done instead
 7 of seizing the house?

8 MR. KELLY: Your Honor, objection, this entire
 9 line.

10 THE COURT: Sustained as to foundation.

11 **Q.** BY MS. POLK: You discussed with the jury
 12 what you did in this case, which was sampling. In
 13 sampling what are you attempting to do? What is the
 14 goal?

15 **A. You're trying to sample any piece of**
 16 **evidence that may have evidentiary value. But it**
 17 **depends on the case. I've been to several homicide**
 18 **investigations.**

19 **Q.** With respect to the site where the sweat
 20 lodge was located, how many hours were you there?

21 **A. I was there from about 8:30 in the**
 22 **morning until 8:30 that night, about 12 hours.**

23 **Q.** When you were in the area of the sweat
 24 lodge, on the outside did you see any ant hills?

25 **A. No.**

1 **Q.** Did you see any evidence of dead ants?

2 **A. No.**

3 **Q.** And how about inside the sweat lodge?

4 Did you see any ant hills?

5 **A. No.**

6 **Q.** Or evidence of dead ants?

7 **A. No.**

8 **Q.** Did you see any evidence of the use of
 9 poisons in the area of the sweat lodge?

10 **A. No.**

11 **Q.** You left the scene at 8:30 p.m. on
 12 October 9, 2009?

13 **A. Yes.**

14 **Q.** And you testified to the jury that you
 15 had a search warrant allowing you to be present and
 16 seizing items?

17 **A. Yes.**

18 **Q.** And when you left, did you release the
 19 scene?

20 **A. I did.**

21 **Q.** And what does that mean to release the
 22 scene?

23 **A. We only have authority over the scene**
 24 **while we're there with the authority of the search**
 25 **warrant. So at some point we have to finish up and**

1 **leave. And once we do that, we have no control or**
 2 **authority over what happens at the scene.**

3 **Q.** How many items did you seize that day?

4 **A. It was a little over 70 items.**

5 **Q.** And will you describe generally the types
 6 of items that you seized?

7 **A. Yes. We seized several of the tobacco**
 8 **pouches that the participants put together and hung**
 9 **up in the sweat lodge. We seized rocks from the**
 10 **pit inside the sweat lodge and also from the fire**
 11 **outside the sweat lodge.**

12 **We seized these poles that you can see in**
 13 **the pictures. We seized obviously the samples of**
 14 **the sweat lodge itself. We seized dirt samples**
 15 **from different areas within the sweat lodge. We**
 16 **seized dirt samples from underneath the -- where**
 17 **all the grandfathers are in the pit inside the**
 18 **sweat lodge.**

19 **We seized the logs used to heat the**
 20 **rocks. We seized -- there were water bottles**
 21 **outside the sweat lodge that belonged to the**
 22 **participants. We seized those. Because, again, we**
 23 **didn't know if there was something in the water or**
 24 **what caused these injuries.**

25 **We seized samples of all the liquids that**

1 were there at the hydration station -- the
2 electrolyte water and the lemon water. We seized
3 boxes of things that were in that recovery station.
4 One box had a bunch of sage and things in it, later
5 we found out was sage. There was a first-aid kit
6 there we had seized.

7 Q. How about any clothing?

8 A. Yes, we did. There were. I wasn't there
9 the night before. But when I responded on the 9th,
10 there were swim trunks, several pairs of swim
11 trunks around the sweat lodge that had obviously
12 been cut off of victims.

13 Q. How about any other personal items such
14 as backpacks?

15 A. Yes. We did seize a couple of backpacks
16 that were still on scene.

17 Q. For everything that you seized, did you
18 photograph?

19 A. Yes.

20 Q. And then subsequently put where?

21 A. Into our evidence.

22 Q. Did you discuss with the Hamiltons the
23 site after you had release the scene?

24 A. Yes.

25 Q. And specifically what did you discuss

1 with the Hamiltons?

2 A. About what they were going to do with the
3 sweat lodge.

4 Q. Did they ask you for guidance on what
5 they were going to do?

6 A. Somewhat. Yes.

7 Q. Did you release the scene to them?

8 A. I did.

9 Q. And there has been testimony in this case
10 about the ceremony that was held on
11 October 10, 2009. Did the Hamiltons discuss that
12 ceremony with you?

13 A. Yes.

14 Q. What did you learn?

15 A. When we were on scene on the 9th, we were
16 kind of wrapping up. At the end of -- you know --
17 searching and collecting evidence, we had taken
18 apart the sweat lodge. We wanted to see if there
19 was anything in between any of the layers or if
20 there was anything else that we missed.

21 The Hamiltons came down. I hadn't
22 interviewed the Hamiltons yet, so they were
23 offering themselves to be interviewed. It was
24 already starting to get late. So I told them I'd
25 come back later and interview them.

1 But they asked about the sweat lodge
2 structure and what we were going to do with it.
3 Michael Hamilton said that they were planning on
4 doing some type of religious ceremony where they
5 burn the wood in the sweat lodge. He explained
6 that would be customary if something bad happened
7 in the sweat lodge.

8 I remember there was a fire fighter that
9 was a part of that conversation. I'm not sure why
10 the fire fighter was there on the night of the 9th,
11 but he had told the Hamiltons, you can't burn the
12 materials.

13 MR. KELLY: Object. It's hearsay.

14 THE COURT: It is. Sustained.

15 Q. BY MS. POLK: Without telling the jury
16 what the fire fighter said, were you part of the
17 conversation with the Hamiltons and the fire
18 fighter?

19 A. Yes.

20 Q. And ultimately what did you tell the
21 Hamiltons?

22 A. I told the Hamiltons that they could burn
23 the wood from the sweat lodge.

24 Q. And what about the tarps and things?

25 A. I didn't -- somebody else commented on

1 the tarps and whether or not they could burn the
2 tarps.

3 Q. Did you direct the Hamiltons in any way
4 that they couldn't remove items once you had
5 released the scene?

6 A. No.

7 Q. How did you convey that to them?

8 A. Well, I told them that that night. And
9 then the following day they had called me and again
10 asked to make sure that they could go forward with
11 their ceremony.

12 Q. And did you understand what they would do
13 during the ceremony in terms of the various
14 materials?

15 A. Yes.

16 Q. What did you tell them?

17 A. I told them they could do whatever they
18 want. We don't have authority. Once we leave and
19 once we're confident we've collected the evidence
20 we need to collect, we can't go back without
21 another search warrant or consent and collect more
22 evidence. So once we leave the scene, they can do
23 whatever they want with it.

24 Q. You had testified yesterday about some
25 participants bringing flowers to you?

1 **A. Yes.**
 2 **Q.** At 8:30 at night when you were releasing
 3 the scene, did you remember the flowers?
 4 **A. I did.**
 5 **Q.** What did you do?
 6 **A. I put them inside the sweat lodge.**
 7 **Q.** Did you hear testimony from Mr. Hamilton
 8 that he believed that he removed the covers from
 9 the frame?
 10 **A. I did.**
 11 **Q.** Who removed the cover from the frame,
 12 Detective?
 13 **A. We did.**
 14 **Q.** And what did it look like when you left
 15 the scene?
 16 **A. It was just the kiva that was remaining.**
 17 **All the tarps and coverings that we took off the**
 18 **sweat lodge, we didn't fold them up or anything.**
 19 **They were just laying there on the ground.**
 20 MS. POLK: Your Honor, counsel has stipulated
 21 to the admission of Exhibit 935.
 22 THE COURT: 935 is admitted.
 23 (Exhibit 935 admitted.)
 24 **Q.** BY MS. POLK: Detective, I'm going to put
 25 935 up on the overhead and ask you to tell the jury

1 what they're looking at here.
 2 **A. That's the skeleton structure for the**
 3 **sweat lodge on October 9 just prior to us leaving.**
 4 **Q.** Was it by this time nightfall?
 5 **A. Yes.**
 6 **Q.** And was it -- what was the light outside
 7 like?
 8 **A. It was almost dark.**
 9 **Q.** Does this show where the covers to the
 10 tarp were when you left to -- i or the sweat lodge?
 11 **A. No. You can't see them.**
 12 **Q.** Would you describe for the jury how you
 13 dressed when you began your sampling or when you
 14 first entered the sweat lodge.
 15 **A. I dressed in a Tyvec suit.**
 16 **Q.** What is that?
 17 **A. That's a suit that's a vapor barrier.**
 18 **It's a waterproof suit potentially.**
 19 **Q.** Why did you dress in a Tyvec suit?
 20 **A. A lot of times we do this so that we**
 21 **don't introduce evidence from us to the scene and**
 22 **vice versa. In this particular case, from what I**
 23 **remember, I didn't know why these people died. And**
 24 **I didn't really want to go inside the sweat lodge**
 25 **without any protective gear on.**

1 **Q.** Do you see somebody in a Tyvec suit in
 2 this picture?
 3 **A. I do.**
 4 **Q.** And can you show the jury where.
 5 **A. There.**
 6 **Q.** Do you know who that is?
 7 **A. That's either me or Josh Nelson.**
 8 **Q.** How long were you in a Tyvec suit at the
 9 scene?
 10 **A. Probably for about two hours.**
 11 **Q.** In deciding, Detective, what items to
 12 seize, will you tell the jury what the factors
 13 were, what you knew at that time -- what were the
 14 factors in deciding what items to seize?
 15 **A. Well, we knew the symptoms that the**
 16 **participants had. We knew two of them had passed**
 17 **away at this point. We knew about Mr. Ray's sweat**
 18 **lodge. It's a little more extreme than the other**
 19 **sweat lodges at Angel Valley.**
 20 **We knew that the structure itself had**
 21 **been used for several other sweat lodges without**
 22 **any problems at all and that it was pretty**
 23 **consistent in Mr. Ray's sweat lodge at Angel Valley**
 24 **that there were problems at least with the last**
 25 **three years. So we knew that these problems were**

1 **not unique to this particular sweat lodge but they**
 2 **were unique to Mr. Ray.**
 3 MR. KELLY: Your Honor, I'd like to approach.
 4 THE COURT: Yes.
 5 (Sidebar conference.)
 6 MR. KELLY: Judge, I move for a mistrial
 7 based on -- I'd incorporate every argument, oral
 8 argument, and written argument we've made in regard
 9 to making comparisons between Mr. Ray's sweat lodge
 10 and other sweat lodges.
 11 I thought we had a clear understanding
 12 yesterday afternoon with how focused the leading
 13 questions were going to be by Ms. Polk and the
 14 response. I met with Ms. Polk. I met with
 15 Mr. Diskin. You made rulings. We complied with
 16 them. And today they just blew the door open.
 17 I'd move for a mistrial.
 18 MS. POLK: Judge, there is absolutely no basis
 19 for a mistrial. The Court gave clear guidance that
 20 this witness could testify as to reasons why the
 21 investigation took the course that he did. What
 22 the witness testified to yesterday, that it was
 23 based on the extreme nature of the way Mr. Ray runs
 24 his sweat lodges in comparison to how other sweat
 25 lodge events were held there.

1 He testified yesterday that he had talked
2 to the Mercers. What we know from the Mercers is
3 that what Mr. Ray does, there is only problems with
4 Mr. Ray's sweat lodges and not with other
5 ceremonies. The jury knows that information.

6 The Court gave us clear guidance
7 yesterday that we could talk about his reasons for
8 why the events went the way he did. What this
9 witness has said is completely consistent with what
10 the Mercers said, simply that there is no problem
11 with other sweat lodge ceremonies that he knew
12 about. There is nothing problematic with that
13 information.

14 And then what he said is that it's the
15 extreme nature of Mr. Ray's sweat lodges, which
16 came in yesterday under the Court's guidance and
17 with Mr. Kelly's consent. There is absolutely no
18 basis to suggest that something has happened
19 through this testimony that is not completely
20 contemplated by the rulings and, in particular,
21 explaining why he processes the crime scene the way
22 he did.

23 THE COURT: And if you'll notice, once again,
24 though the way he answers this, we knew. We knew.
25 We knew. Based on interviewing some people at the

1 stand and I'm thinking of -- you know --
2 Mrs. Mercer's testimony when she talked about
3 having -- I have photos that will show 40 people
4 that were in various states. Oh. I was
5 exaggerating. That's what he knew. That's the
6 information that he had that he knew.

7 You know, Ms. Polk, that information, if
8 it was his belief, if it was put in that fashion,
9 if it was made clear. But every chance it seems it
10 comes up, people want to assert that they know
11 things based on this. He used the word "know"
12 again. How does he know?

13 MS. POLK: Here's the problem I am having: If
14 I try to lead the witness, Mr. Kelly objects. He
15 tells me at the last sidebar, why can't Ms. Polk
16 ask open-ended questions. So I ask an open-ended
17 question. That's where we are.

18 THE COURT: This is one area where we had this
19 lengthy sidebar best that we said it was best to
20 lead, and it went just fine yesterday with you
21 leading through that.

22 So I'm going to deny the motion for
23 mistrial. There has to be a question that makes it
24 clear that this is just his belief based on this
25 initial investigation or something like that, that

1 he knew this, he knew that, and no more.

2 MS. POLK: I will ask that question. But I
3 would ask, then, that Mr. Kelly, when I'm trying to
4 lead a witness for a purpose, that Mr. Kelly allow
5 me to do it. My attempts to lead have been very
6 careful, very focused, when I want to go into a
7 specific area. And then I get objections. I get
8 Mr. Kelly at sidebar telling me, why can't Ms. Polk
9 ask open-ended questions?

10 Mr. Kelly knows the areas that we're
11 going into. He knows we need to tread carefully
12 and then repeatedly stands here and suggests that I
13 intentionally violate the Constitution and all the
14 other inflammatory language he uses, and why can't
15 I ask open-ended questions. You can't have it both
16 ways.

17 THE COURT: This is an area I specifically
18 indicated leading.

19 And, Ms. Polk, you've indicated you're
20 going to clear the record on this.

21 And I denied the motion for mistrial.

22 (End of sidebar conference.)

23 THE COURT: Ms. Polk.

24 MS. POLK: Thank you, Your Honor.

25 Q. Detective, the conclusions that you just

1 stated for the jury were based on your beliefs at
2 the time? Yes?

3 A. Yes.

4 Q. I want to talk specifically, then, about
5 items that you seized. And I'm going to put up on
6 the overhead Exhibit 915. And it has a marker on
7 it as item 36. Is that one of the items that you
8 seized?

9 A. Yes.

10 Q. Do you recall, Detective, how many
11 tobacco pouches were still hanging inside the sweat
12 lodge, if you recall?

13 A. I remember there were several.

14 Q. Did you seize all of them?

15 A. I believe all the ones that were from
16 this sweat lodge. There were some that obviously
17 had been in there for quite some time that we
18 didn't take.

19 Q. I'm going to put up on the overhead
20 Exhibit 512 and ask you about the logs. How many
21 did you seize?

22 A. We seized four of the logs.

23 Q. And one of them we've already opened here
24 in the courtroom?

25 A. Yes.

1 Q. What I'd like to do is ask you to come
2 back down and let's open up that box again.

3 A. Okay.

4 Q. This is item 903. If you could just pull
5 it out, I have a question for you. Will you show
6 the jury the area of the nail that was identified
7 for them through another witness. And just walk up
8 and down and just show them the nail.

9 What I would ask you, Detective, is,
10 based on your training and experience in the
11 construction industry, do you recognize that nail?

12 A. I do.

13 Q. What do you recognize it to be?

14 A. **This is the type of nail you use to nail**
15 **down roofing paper. I actually have some of these**
16 **nails at home. You use it on things like plastic**
17 **or paper. It has a plastic flange all the way**
18 **around it. And it just adds a little bit more**
19 **surface area to hold down the material.**

20 Q. Thank you. If you will go ahead and put
21 that one back.

22 The other three items that you seized,
23 Detective -- will they be brought into court later
24 today?

25 A. **Yes. Hopefully they should be here any**

1 time.

2 Q. Where are they right now?

3 A. **Two of them are on the bench back here,**
4 **and one of them our evidence techs are bringing in**
5 **today.**

6 Q. Let's go ahead, then, and open the two
7 that we have here. What I'll do is clear this area
8 over here, and you can open.

9 A. **I did not bring a knife.**

10 THE COURT: What number is this going to be?

11 THE CLERK: 968 and 969.

12 THE COURT: Mr. Kelly, is there going to be an
13 objection to these?

14 MR. KELLY: I don't have any objection to
15 admission. I'm going to leave it to the Court and
16 the state as to how it's done with physical
17 evidence.

18 THE COURT: The way it's been done in the past
19 with the other physical evidence, I'm going to
20 order that the box will be marked, and then there
21 will be photographs.

22 I'll just note, then, without objection,
23 968 and 969 will be admitted for demonstrative
24 purposes with photographs substituted for the
25 record.

1 (Exhibits 968 and 969 admitted.)

2 Q. BY MS. POLK: Detective, will you go
3 ahead and open 968.

4 Are you able to tell the jury referencing
5 the exhibit on the overhead which number this was?
6 Or do you need to look?

7 A. **I'll need to look at my evidence log. I**
8 **do know. Item No. 300, which is item No. 1, which**
9 **is the one all the way on the right.**

10 Q. This one over here?

11 A. Yes.

12 Q. Go ahead and just show it to the jury, if
13 you would.

14 I'll just ask you, Detective, are there
15 any nails in that item?

16 A. **I don't see any.**

17 Q. Go ahead and put that one away.

18 And if you will take a look at 969 and
19 pull it out. And you can show that one to the
20 jury. Detective, 969 was item 303. It's marked
21 item 303 on the box. Are you able to tell us what
22 item it is on the photograph?

23 A. **Yes. It's item No. 4, which is all the**
24 **way on the right.**

25 Q. I have the last one was the one on the

1 right.

2 A. **I'm sorry. The one on the left.**

3 Q. The other left.

4 And let me ask you. Do you see any nails
5 in this item?

6 A. **No, I don't.**

7 Q. This one has -- actually, let me have you
8 come back because I know there are items that are
9 broken off from it inside the box?

10 A. Yes.

11 Q. Do you know what caused that?

12 A. **Yes. The lab didn't have a way to test**
13 **the whole log. So they wanted us to chip off**
14 **pieces of it and just send the pieces into the lab**
15 **and test for any kind of volatiles.**

16 Q. We'll talk more about the lab testing.

17 But what we see in the box are the chips that were
18 then broken off at some point?

19 A. Uh-huh.

20 Q. Detective, the last log that will come
21 later to the court is which one?

22 A. **That would be item No. 3 in the picture.**

23 Q. How did you choose what logs to seize for
24 testing?

25 A. **Well, I just wanted to take at least one**

1 log from different parts of the entire wood pile.
 2 I wasn't -- it looked like they were taking wood
 3 off the wood pile based on how much wood was left
 4 from the different parts of the wood pile. So not
 5 knowing exactly where they were taking the wood
 6 from, I just wanted a sampling from the four
 7 different parts of the wood pile.

8 Q. You referenced just briefly for the jury
 9 some testing and the lab. Will you tell the jury,
 10 first of all, what lab you're referring to.

11 A. Yes. We use primarily the Department of
 12 Public Safety crime lab, which we refer to as the
 13 "DPS crime lab." They have a lab in Flagstaff and
 14 also in Phoenix.

15 Q. And what is the process, then, to get an
 16 item from the scene and ultimately to the lab for
 17 testing?

18 A. Well, first it's submitted into our
 19 evidence. Then when we request testing, we,
 20 essentially, send an email usually to our evidence
 21 technicians. They will then fill out a lab
 22 request, which I'm not sure exactly what that
 23 entails. It's something that the lab requires.

24 Q. In this instance would the lab take an
 25 entire log for testing?

1 A. No.

2 Q. Are you able to tell the jury now when it
 3 was that the item went to the lab for testing, when
 4 the logs went.

5 A. I can look at the lab report and see when
 6 the report came out.

7 Q. We can go back to that. But just
 8 generally speaking, after seizing four logs, did
 9 you send all four logs to the state crime lab for
 10 testing?

11 A. I believe I requested that all four logs
 12 be tested.

13 Q. Did you send all four to the lab or
 14 pieces from all four?

15 A. I believe so.

16 Q. Do you know, were tests subsequently
 17 performed?

18 A. Yes.

19 Q. And on how many items?

20 A. On the logs I believe it was one or two.

21 Q. These logs, then, how do they get back?
 22 Did the logs ever go to the lab or just samples?

23 A. No. I believe just samples. What
 24 happens is when we take a sample off of an item to
 25 send to the lab, we generally make that item a new

1 item number. It's packed separately, and it
 2 becomes a new item number.

3 It's referenced that this came from --
 4 for instance, the log is log 300. This item number
 5 came from item No. 3 and is a chip off No. 300.
 6 The new item number then goes to the lab.

7 Q. And the underlying item itself, the logs,
 8 remained at the Yavapai County Sheriff's Office
 9 evidence storage facility?

10 A. Yes.

11 Q. Is that where they have been until you
 12 brought them here to court?

13 A. Yes.

14 Q. Have they remained available?

15 A. Yes.

16 Q. Detective, I'm going to put up on the
 17 overhead Exhibit 493. That shows the scrap pile in
 18 front of the log, the stack of logs. Did you
 19 testify yesterday about your decision to not seize
 20 pieces from that scrap pile?

21 A. Yes.

22 Q. I want to ask you, Detective, if in this
 23 photograph do you see a second area of scrap pile
 24 of logs?

25 A. I don't in this photograph.

1 Q. And if I put up on the overhead
 2 Exhibit 491, do you there see a second scrap pile?

3 A. I do.

4 Q. And based on your investigation, do you
 5 know where the second fire that's been called "the
 6 small intentions fire" -- do you know where that
 7 fire was?

8 A. I do.

9 Q. Do you see it on this photograph?

10 A. It looks like you can see a little bit of
 11 the ash over here from it, but that fire was over
 12 here.

13 Q. And based on your investigation at the
 14 scene, do you recall looking at the proximity of
 15 the small intention fire to this scrap pile over
 16 here?

17 A. Yes.

18 Q. Did you seize any wood from this scrap
 19 pile?

20 A. I didn't.

21 Q. And why not?

22 A. I had no indication that wood was used to
 23 heat the rocks that went inside the sweat lodge.
 24 There was no evidence that that wood could have
 25 contributed to these people's injuries.

1 Q. And you've already testified to the jury
2 your training and experience in the construction
3 industry. Did you look at that log, that scrap
4 pile, and determine whether or not it contained any
5 pressure-treated wood?

6 A. **I don't remember on scene looking at it.**
7 **I can see right now that it doesn't. It's just raw**
8 **wood. It's not lumber.**

9 Q. Do you recall, Detective, the pieces of
10 wood that we see over in this area?

11 A. **Yes.**

12 Q. And do you recall what that was?

13 A. **Yeah. Looked like part of a tree, like**
14 **somebody had cut down a tree.**

15 Q. Detective, I'm going to put back up on
16 the overhead Exhibit 935 and ask you if you seized
17 any part of the frame for the sweat lodge?

18 A. **We did.**

19 Q. And how many pieces did you seize?

20 A. **I believe we took four pieces.**

21 Q. I'm going to put up on the overhead
22 Exhibit 309.

23 And, Your Honor, as I recall, this was
24 stipulated to. I don't have it marked as admitted.

25 MR. KELLY: Judge, I have no objection.

1 THE COURT: 309 had not been. It's admitted
2 now -- 309.

3 (Exhibit 309 admitted.)

4 Q. BY MS. POLK: What does this show the
5 jury?

6 A. **That's one of the uprights that was near**
7 **the fire pit. There were, I believe, four or five**
8 **of these that made kind of a half circle around the**
9 **fire pit, it appeared for center support for the**
10 **sweat lodge.**

11 Q. Let me put back up 935 and have you
12 illustrate what you just said for the jury.

13 A. **You can see some of the center uprights.**
14 **You can't really see the other ones from this**
15 **picture.**

16 Q. And Exhibit 309 is what?

17 A. **It is one of those center uprights.**

18 Q. Detective, the willow branches from the
19 frame that you seized -- what did you do with them?

20 A. **The same thing we did with the logs.**
21 **They requested that they be tested. And I believe**
22 **that there were pieces that were cut off of those**
23 **that were sent to the lab.**

24 Q. And with regard to the remainder of those
25 willow branches, have they remained at the evidence

1 storage facilities?

2 A. **Yes.**

3 Q. Have they remained available?

4 A. **Yes.**

5 MS. POLK: Your Honor, counsel has agreed to
6 the admission of Exhibits 338 and 329. I'm sorry.
7 328 and 329.

8 THE COURT: 328 and 329 are admitted.

9 (Exhibits 328 and 329 admitted.)

10 Q. BY MS. POLK: Detective, how many rocks
11 did you seize?

12 A. **I would have to look at the evidence logs**
13 **to be sure. But I believe we took five or six from**
14 **the inside, not fire pit -- but taken from inside**
15 **the sweat lodge, and then we took some from the pit**
16 **that was outside the sweat lodge.**

17 Q. I'm going to put up on the overhead
18 Exhibit 328. What does that show you?

19 A. **That shows that there were six rocks that**
20 **have been marked as evidence items.**

21 Q. Would you have seized six if you marked
22 six?

23 A. **Yes.**

24 Q. What is this over here?

25 A. **That's just -- that's the scale part of**

1 **the marker.**

2 Q. Marker 48?

3 A. **Yes.**

4 Q. I'm going to put up on the overhead
5 Exhibit 493. Does this show you additional rocks
6 that you seized?

7 A. **I see at least four rocks that are**
8 **numbered.**

9 Q. So you seized rocks from inside the sweat
10 lodge as well as rocks from where?

11 A. **From outside the sweat lodge in the fire**
12 **pit that was used to heat the rocks.**

13 Q. Did you send these rocks to the state
14 crime lab?

15 A. **I did.**

16 Q. Did you send all the rocks?

17 A. **I believe so.**

18 Q. To your knowledge, was testing done
19 there?

20 A. **Yes. I believe they only tested one of**
21 **the rocks that was from inside and one of the rocks**
22 **from outside.**

23 Q. What happened to the rocks after testing
24 at the state crime lab?

25 A. **They would be returned to our evidence.**

1 Q. Have they been there ever since?

2 A. Yes.

3 Q. Detective, you talked about sampling the
4 covers that were on the sweat lodge itself. How
5 many samples did you take?

6 A. I took four samples.

7 Q. In taking the four samples, did you
8 identify specific areas?

9 A. Yes.

10 Q. And just generally, describe for the jury
11 those areas.

12 A. There were four areas. We used north,
13 east, south and west.

14 MS. POLK: Your Honor, counsel has stipulated
15 to the admission of the following exhibits: 546,
16 942, 938, 548, 939, 549, 940, 950, 941, 339, and
17 340.

18 THE COURT: The exhibits just recited by
19 Ms. Polk are admitted.

20 (Exhibits 339, 340, 546, 548, 549,
21 938-942, and 950 admitted.)

22 Q. BY MS. POLK: Detective, I'd like to go
23 through the photographs that are photographs of the
24 area where you sampled from and the cuts made, and
25 in doing so have you describe for the jury the area

1 of the sweat lodge.

2 I'm going to put up first Exhibit 546 and
3 ask you if you recognize that photograph?

4 A. I do.

5 Q. And, Detective, the testimony in this
6 case has been that the cover of the sweat lodge was
7 brown?

8 A. Yes.

9 Q. In a lot of these photographs it looks
10 blue. Do you know why?

11 A. It was later in the afternoon when --
12 this is the last thing that we did was cut these
13 samples. It was later in the afternoon. And just
14 with the lighting, it looks like the tarps are
15 blue, but this is that big, brown rubber tarp that
16 we had seen previously.

17 Q. Are you able, just by looking at the
18 photographs, to recall what area of the sweat lodge
19 this first cut was made?

20 A. Yes.

21 Q. What area?

22 A. This would be in the south side.

23 Q. Let's do this. I'm going to draw a
24 circle representing the sweat lodge. And I'm going
25 to have the entrance over what I'm going to call

1 "6:00 o'clock."

2 A. Okay.

3 Q. And then 12:00 o'clock over here. Was it
4 this sweat lodge -- do you know what orientation it
5 was in terms of north, south, east, west?

6 A. Yes. It appeared that the door was
7 closer to east than it was south. A lot of the
8 people involved with the case thought the door was
9 facing south. It was actually more east than
10 south. There is some confusion as to which
11 direction to use.

12 Q. On this little diagram that I'm drawing,
13 where would north be?

14 A. It would be more over here.

15 Q. And then south would be?

16 A. Would be about here.

17 Q. East?

18 A. East was close to the door.

19 Q. And then west over here?

20 A. Right.

21 Q. We have 6:00 o'clock and 12:00 o'clock.
22 I'm going to put 9:00 o'clock and then
23 3:00 o'clock.

24 This first cut was taken where?

25 A. This would have been taken at

1 9:00 o'clock.

2 Q. I should have put some little markers.
3 This is really 9:00 o'clock right here.

4 Was it taken directly at 9:00 o'clock?

5 A. No.

6 Q. Where was it?

7 A. It's in that same general area of
8 9:00 o'clock.

9 Q. Is it the 6:00 to 9:00 or 9:00 to 12:00
10 area?

11 A. This would be the 9:00 to 12:00 area.

12 Q. I'm going to put up Exhibit 942. Can you
13 tell the jury whether or not this is a close up of
14 the cuts made in that area?

15 A. Yes. It is.

16 Q. Now I'm going to put up Exhibit 938. Are
17 you able to see, Detective, what's written on that
18 exhibit? And I can bring you the actual
19 photograph.

20 A. Yes. It says, west.

21 Q. Is there a number on it?

22 A. It's No. 357.

23 Q. Does that help you determine where this
24 cut was made?

25 A. Yes.

1 Q. Tell the jury where this cut was made.
 2 A. **This would be between 9:00 o'clock and**
 3 **12:00 o'clock.**
 4 Q. So that previous cut, is it possible that
 5 previous cut was the 6:00 to 9:00 o'clock cut?
 6 A. **Yes. I'm sorry.**
 7 Q. And now this cut is the 9:00 to
 8 12:00 o'clock?
 9 A. **Yes.**
 10 Q. And why did you write on it like you
 11 have?
 12 A. **So that we could identify areas that we**
 13 **were going cut out. On the picture you can see**
 14 **where it is.**
 15 Q. And that swatch of cloth that the jury
 16 saw through the testimony of Mr. Hamilton would be
 17 one of these cutouts?
 18 A. **Yes.**
 19 Q. I'm going to put up Exhibit 548. Is that
 20 a close up?
 21 A. **It is.**
 22 Q. What is seen in the background?
 23 A. **You can see one of our patrol cars here.**
 24 **And this is the recovery station where the water**
 25 **was.**

1 Q. And, again, this is the 9:00 to
 2 12:00 o'clock?
 3 A. **Yes.**
 4 Q. Then is Exhibit 939 just another close-up
 5 of that cut?
 6 A. **Yes.**
 7 Q. This next exhibit is Exhibit 549. Is
 8 this an area of another cut?
 9 Detective, you want me to bring you the
 10 photograph?
 11 A. **Yes. Okay. Yes.**
 12 Q. What does that say on it?
 13 A. **I can't tell.**
 14 Q. Is that your writing for one of the cuts,
 15 though?
 16 A. **It is.**
 17 Q. And tell the jury where this cut was
 18 made.
 19 A. **I'm assuming that says, north. Although**
 20 **I couldn't see the writing on it. And this would**
 21 **have been between the 12:00 o'clock and**
 22 **3:00 o'clock position.**
 23 Q. I'm going to put up on the overhead
 24 Exhibit 904, which appears to be a close up. What
 25 does that say?

1 A. **I believe it says, north. I can see part**
 2 **of the word "north."**
 3 Q. I'm going to put up on the overhead
 4 Exhibit 550. Is this the cut, then, actually made
 5 in that spot?
 6 A. **Yes.**
 7 Q. And, again, this is the 12:00 to
 8 3:00 o'clock?
 9 A. **Yes.**
 10 Q. And the last cut that you made, the
 11 fourth cut, I'm going to put up Exhibit 949. And,
 12 again, can you read that? I can bring it to you if
 13 you would like.
 14 A. **I would like that. I can see the item**
 15 **number. I'm assuming it says, east, but I don't**
 16 **actually see that.**
 17 Q. Where would that area be?
 18 A. **The last cut I made was pretty much right**
 19 **over the door. So that would be at about**
 20 **6:00 o'clock.**
 21 Q. And I'm going to put up on the overhead
 22 Exhibit 339. Does that show you the last cut?
 23 A. **Yes.**
 24 Q. Do you recognize in this photograph
 25 anything that looks like the door?

1 A. **Yes.**
 2 Q. It shows the jury what?
 3 A. **You can see on that top tarp how it's cut**
 4 **out for the opening.**
 5 Q. And I'm going to put up on the overhead
 6 Exhibit 340. Is that a close up of that last cut?
 7 A. **Yes.**
 8 Q. Each of these cuts. How were they then
 9 stored?
 10 A. **They were stored in what looks like a**
 11 **paint can.**
 12 Q. How did you, or did you, Detective,
 13 attempt to maintain the same order of layering when
 14 you took these cuts?
 15 A. **Yes, I did.**
 16 Q. And how did you do that?
 17 A. **I made a point to do that. I actually**
 18 **cut from the inside. I would cut one section at a**
 19 **time and set it down to make sure it was facing the**
 20 **same direction so I could keep that same order.**
 21 Q. Detective, those four cans have been
 22 brought into the courtroom with those four cuts?
 23 A. **Yes.**
 24 Q. Do you have a way to open the one that's
 25 rattling?

1 **A. Yes.**

2 **Q.** If you would do that. Let me know what
3 exhibit number that is.

4 **A. This is Exhibit 900.**

5 THE COURT: Ms. Polk, we do need to recess at
6 10 till.

7 MS. POLK: Thank you.

8 **Q.** Detective, let me ask you, first of all,
9 about the decision to store the samples of the
10 covers in these tin cans. Did you consult with
11 somebody before doing that?

12 **A. I believe our evidence tech did. I know**
13 **that we used cans like this for certain types of**
14 **evidence.**

15 **Q.** And is the way you store something that
16 you seized -- is that done in consultation with the
17 state crime lab technicians?

18 **A. It is.**

19 **Q.** And these particular cans, where did they
20 come from? Do you know?

21 **A. I'm not sure. I believe there is**
22 **companies that sell items for collecting evidence.**
23 **And I believe it's one of those companies.**

24 **Q.** And if you open, then, and pull out the
25 sample that is in this can. First of all, this

1 item, 358 -- are you able to tell the jury which of
2 the cuts is this one?

3 **A. Yes. I have north written on here. This**
4 **would have been the one between 12:00 o'clock and**
5 **3:00 o'clock.**

6 **Q.** And are you able to tell the jury whether
7 or not this is one of the cuts that went to the
8 state lab for testing?

9 **A. Yes.**

10 **Q.** Now, you testified to the jury with
11 respect to the willow branches and the logs that
12 only pieces went to the crime lab for testing. How
13 about with respect to these cuts?

14 **A. Well, these cuts were the pieces that we**
15 **planned on sending to the crime lab.**

16 **Q.** So the entire pieces went?

17 **A. Yes.**

18 **Q.** And do you know whether they were tested?

19 **A. I do.**

20 **Q.** And after testing, they then were
21 returned to the Yavapai County Sheriff's evidence
22 storage facility?

23 **A. Yes.**

24 **Q.** And these pieces have remained there
25 available?

1 **A. Yes.**

2 **Q.** Detective, inside here is something
3 that's rattling?

4 **A. Yes.**

5 **Q.** Would you pull them out.

6 And do you know what these items are?

7 **A. I do.**

8 **Q.** If you will just show them to the jury.

9 How is it that you know what these items are?

10 **A. Because the lab explained what these**
11 **items are.**

12 **Q.** When you sent them to the lab, did these
13 coverings have these items in them?

14 **A. No.**

15 **Q.** When it came back from the lab, did it
16 have these items in them?

17 **A. Yes.**

18 **Q.** Will you tell the jury what those items
19 are.

20 **A. These are carbon strips used by the lab**
21 **to collect any volatiles released from the tarp.**
22 **So they -- what they did at the lab was they heated**
23 **up the materials. And then these carbon strips**
24 **would collect any of the volatiles released from**
25 **the materials. And then these carbon strips are**

1 **what's actually tested for the different volatiles.**

2 **Q.** Will you put the carbon strips back in
3 and return the cloth.

4 Your Honor, counsel has stipulated to the
5 admission of the following exhibits: 949, 541,
6 542, 543, 544, and 545.

7 THE COURT: Those exhibits just mentioned are
8 admitted.

9 MS. POLK: Thank you.

10 (Exhibits 541-545 and 949 admitted.)

11 **Q.** BY MS. POLK: Detective, you testified
12 earlier that you collected samples of the soil in
13 the area?

14 **A. Yes.**

15 MS. POLK: Your Honor, I can either start or
16 this is probably a good break time.

17 THE COURT: Let's do that.

18 Ladies and gentlemen, we will take the
19 noon recess. And, as I mentioned yesterday, I want
20 to start earlier. So please be reassembled at
21 1:00. We'll start as soon as we can after that.

22 Remember the admonition.

23 And, Detective, you are excused at this
24 time as well.

25 And we will be in recess. Thank you.

1 (Recess.)
2 THE COURT: The record will show the presence
3 of Mr. Ray, the attorneys, the jury.
4 Detective Diskin has returned to the stand.

5 Ms. Polk.

6 MS. POLK: Thank you, Your Honor.

7 Q. Detective, I'm going to put up on the
8 overhead Exhibit 328 and ask you a question about
9 the rock that the jury saw when Mr. Hamilton
10 testified.

11 Can you tell the jury whether the rock
12 that the jury saw when Mr. Hamilton testified --
13 was it a rock from the inside of the sweat lodge or
14 from the outside?

15 A. **It was a rock from the inside.**

16 Q. Detective, the fourth log is now here in
17 the courtroom. So I'd like to ask you to glove up
18 and come down, and we'll open it up. This has been
19 marked as Exhibit 970.

20 Can you show that log to the jury,
21 please.

22 Are you able to tell the jury, then,
23 looking at Exhibit 512 on the overhead, which of
24 the four markers that came from?

25 A. **Yes. This would be No. 2. So it's just**

138

1 **to the left of the first one on the right.**

2 Q. Is that right here?

3 A. **From the right it would be the second**
4 **one. Yes.**

5 Q. Detective, are you able to -- will you
6 take a look at that log and tell the jury whether
7 or not you see any nails in it.

8 A. **Yes. There's one nail that appears to be**
9 **the same kind of nail that has the plastic flange**
10 **on it to hold down plastic.**

11 Q. Thank you. You can go ahead and put that
12 log away.

13 Detective, will you tell the jury whether
14 with respect to being in the middle, on the top, on
15 the bottom, where were the four logs that you
16 seized.

17 A. **They were all four on the top.**

18 Q. Detective, there has been testimony about
19 the various pouches that you seized. And I'd like
20 you to open one of those pouches for the jury.
21 This is item number 981.

22 Your Honor, I'd move at this time for the
23 admission of 981.

24 THE COURT: Mr. Kelly?

25 MR. KELLY: No objection.

1 THE COURT: 981 admitted.

2 (Exhibit 981 admitted.)

3 MS. POLK: Your Honor, the previous exhibit,
4 970, is not admitted.

5 MR. KELLY: Judge, I'm still under the same
6 understanding that photographs are going to replace
7 the physical items.

8 THE COURT: And I want to announce that. Just
9 make clear each time so the clerk knows. But when
10 these exhibits are admitted and they are the actual
11 physical exhibit, that is admitted for
12 demonstrative purposes. A photograph will be
13 substituted with this number. And that will be the
14 procedure throughout the case.

15 MR. KELLY: In regards to 981, I ask there not
16 be any duplication if there is already a photograph
17 in evidence depicting that item.

18 THE COURT: There should be one photograph
19 matching up with the exhibit number, Ms. Polk.

20 MS. POLK: Your Honor, I'm not sure what
21 Mr. Kelly is referred to. Obviously the jury has
22 seen several photographs with tobacco pouches in
23 them.

24 THE COURT: Okay. Well, there is going to be
25 a physical exhibit, and there will be a photograph

140

1 that corresponds. And there will be one photograph
2 unless it's noted for some reason there needs to be
3 another. We'll need to look at that.

4 But for now the understanding is there
5 will be a photograph that corresponds to each
6 physical exhibit.

7 Q. BY MS. POLK: Detective, what item number
8 is the pouch that you're about to open?

9 A. **This is item No. 335.**

10 Q. What marker number?

11 A. **It would be marker No. 36.**

12 Q. How do you correlate 335 with 36?

13 A. **We started a new series when we went to**
14 **the sweat lodge to number the items down there. We**
15 **started with the 300 series. We started with**
16 **No. 300. So we didn't have a marker of zero. So**
17 **we started with a marker of 1. So the number is**
18 **going to be one off. So that's why this is item**
19 **No. 335, but the marker is No. 36. We started with**
20 **a 300. We didn't have a zero marker.**

21 Q. Go ahead and open up.

22 THE COURT: I'll also note that for the
23 physical exhibits, they're marked on the envelope
24 or the container.

25 Q. BY MS. POLK: Detective, if you will just

1 slowly walk from one end of the jury box to the
2 other so the jury can look at it.

3 I'm putting up on the overhead

4 Exhibit 917. Is that the same item that is
5 depicted in this photograph?

6 **A. Yes.**

7 **Q.** Go ahead and put it back in its envelope.

8 I'd like to talk about the soil in the
9 area of the sweat lodge, both inside and out. On
10 October 9 when you were at the area processing the
11 scene, did you have the opportunity to observe the
12 condition of the soil in the area where testimony
13 has been that three people were pulled out?

14 **A. Yes. There were two people pulled out of**
15 **one spot and a third person pulled out in a**
16 **different spot.**

17 **Q.** And with respect to the area, not the
18 door, but the area where testimony has been that
19 Kirby Brown and James Shore were pulled out, did
20 you observe the condition of the soil?

21 **A. Yes. It was really wet, not, like,**
22 **sloppy, muddy wet. It was pretty damp in that**
23 **general area right on the edge of the sweat lodge.**

24 **Q.** Did you collect soil samples?

25 **A. Yes.**

1 **Q.** And actually let me just back up a
2 moment. I'm going to put up on the overhead 534.
3 What area of the sweat lodge is this?

4 **A. This area over here is where James Shore**
5 **and Kirby Brown were drug out. You can see a drag**
6 **mark here.**

7 **Q.** Does this photograph depict the
8 conditions of the soil that you just testified
9 about?

10 **A. Yes.**

11 **Q.** And show the jury how.

12 **A. You can kind of see a water line about**
13 **right here. And all this this way is pretty wet --**
14 **the soil. And the victims after they were drug out**
15 **were treated just on the other side of this.**

16 **Q.** With regard to the soil samples that you
17 collected, how many did you collect from inside the
18 sweat lodge?

19 **A. There were four.**

20 **Q.** How did you decide what areas to sample?

21 **A. I asked for four different areas within**
22 **the sweat lodge so we could get a sampling from**
23 **different sections of the sweat lodge.**

24 **Q.** At the time that you were deciding what
25 area to gather soil samples from, did you notice

1 the condition of the soil throughout the sweat
2 lodge?

3 **A. Yes.**

4 **Q.** And tell the jury what you noticed about
5 the condition of the soil.

6 **A. There were places where the sand was dry,**
7 **and there were place where the sand was wet.**

8 **Q.** In this trial, Detective, did you hear a
9 witness testify that Mr. Ray told a participant
10 inside the sweat lodge to urinate?

11 **A. Yes.**

12 **MR. KELLY:** Your Honor, I'm going to object.
13 Asking for a hearsay response.

14 **MS. POLK:** Judge, it's foundation.

15 **THE COURT:** It's recounting some testimony.
16 Overruled.

17 **Q.** BY MS. POLK: At the time you made a
18 decision about where to collect soil samples from,
19 did you know that specific information?

20 **A. No.**

21 **Q.** Have you brought the soil samples that
22 you collected from within the sweat lodge to the
23 courthouse today?

24 **A. Yes.**

25 **Q.** And at whose request?

1 **A. The defense asked me to bring those.**

2 **Q.** And, Detective, they are -- they've been
3 marked, and they're sitting here over where all the
4 evidence is?

5 **A. Yes.**

6 **Q.** Did you also collect soil samples from
7 the outside of the sweat lodge?

8 **A. Yes. If I could just clear this up. I**
9 **didn't actually collect the samples. I asked Josh**
10 **Nelson to collect the samples. He's the one that**
11 **actually collected the soil samples. I didn't**
12 **physically do it myself.**

13 **Q.** Did Josh Nelson collect samples from
14 outside the sweat lodge?

15 **A. Yes.**

16 **Q.** How many samples were collected?

17 **A. On October 9th I think there was only one**
18 **sample collected from the fire pit where the rocks**
19 **were heated.**

20 **Q.** At some point did a member from the
21 Yavapai County Sheriff's Office go back out to
22 Angel Valley and collect an additional sample?

23 **A. Yes.**

24 **Q.** When did that occur?

25 **A. I think that was October 30.**

1 Q. Was that you?
 2 A. No.
 3 Q. Who was that?
 4 A. I know Josh Nelson went out. I think
 5 Sergeant Winslow also went.
 6 Q. Do you know what the purpose of
 7 collecting a second sample at the end of October
 8 of 2009 was?
 9 A. Yes.
 10 Q. And how do you know that?
 11 A. Because in conversations with the
 12 Department of Public Safety crime lab, we talked to
 13 them about -- you know -- what do we do with this
 14 when we explained the case that we had and the
 15 testing we were going to do.
 16 They explained to us that we needed a
 17 control sample from outside the sweat lodge. They
 18 wanted us to go back to the area, make sure we get
 19 the same type of soil that wasn't exposed to the
 20 inside of the sweat lodge because they could use
 21 that as kind of a control sample.
 22 Q. Do you know what the term "control
 23 sample" means?
 24 A. Yes.
 25 Q. What does it mean?

1 A. It means the sample that wouldn't have
 2 been contaminated.
 3 Q. Detective, did those soil samples go to
 4 the state crime lab?
 5 A. Yes.
 6 Q. And did they come back from the state
 7 crime lab?
 8 A. Yes.
 9 Q. Where were they returned to after coming
 10 back from the crime lab?
 11 A. They were returned to evidence.
 12 Q. And those are available samples?
 13 A. Yes.
 14 Q. I'm going to put up on the overhead
 15 Exhibit 318 and ask you to identify this for the
 16 jury.
 17 A. This is -- I'm not sure what term we're
 18 using for this. It's the hydration station where
 19 they have the lemon water and the electrolyte
 20 water.
 21 Q. Did you sample this area?
 22 A. Yes.
 23 Q. And tell the jury what you sampled.
 24 A. We took samples of both containers of
 25 liquid. There were watermelon slices and orange

1 slices. We took samples of those. You can see all
 2 these water bottles and stuff here. We took all
 3 the water bottles, the liquids, pretty much
 4 everything.
 5 Q. The samples that you took from the two
 6 dispensers -- did you send those to the state crime
 7 lab?
 8 A. I don't recall.
 9 Q. Do you know whether or not they were ever
 10 tested?
 11 A. I don't believe so.
 12 Q. And the water bottles that you collected
 13 from the scene -- did you send those to the state
 14 crime lab?
 15 A. No.
 16 Q. Why not?
 17 A. Well, just from talking to witnesses, we
 18 learned that it didn't really matter who drank the
 19 water and who didn't. The water in the coolers
 20 didn't appear to be a factor at all.
 21 Q. I'm going to put up on the overhead
 22 Exhibit 322.
 23 And, Detective, going back with regard to
 24 the water bottles that were seized, where are they
 25 today?

1 A. They're still in our evidence.
 2 Q. And with regard to the samples from those
 3 two containers, where are those samples?
 4 A. Still in our evidence.
 5 Q. Those are available?
 6 A. Yes.
 7 Q. With regard to Exhibit 322, which is up
 8 on the overhead now, did you sample the fruit?
 9 A. Yes.
 10 Q. Did you send that to the state crime lab
 11 for testing?
 12 A. No.
 13 Q. And why not?
 14 A. Again, some people ate the fruit. Some
 15 people didn't. It didn't seem to have any
 16 correlation with who got sick. It didn't seem to
 17 be relevant.
 18 Q. Detective, do you recall during one of
 19 the days of this trial questions from Mr. Li about
 20 whether or not there were insects on the fruit?
 21 A. Yes.
 22 Q. Did you look at these pictures after that
 23 testimony?
 24 A. I did.
 25 Q. And how did you look at the pictures?

1 **A. I used my laptop. I used the original**
 2 **pictures and zoomed in on my laptop.**
 3 **Q.** For what purpose?
 4 **A. To see if I could find any bugs.**
 5 **Q.** What did you see?
 6 **A. I saw some bugs.**
 7 **Q.** Do you know how many?
 8 **A. There is a few on the fruit. The reason**
 9 **I looked at these pictures is because I remember on**
 10 **scene there were flies all over the fruit. You can**
 11 **see a few of them, I believe, in this picture.**
 12 **Although it's hard to tell. I also looked for**
 13 **ants.**
 14 **Q.** Did you see any ants?
 15 **A. I did.**
 16 **Q.** Where did you see the ants?
 17 **A. Actually just below this table here on**
 18 **the ground.**
 19 **Q.** Are you talking about at the scene now or
 20 when you looked at the photograph on your computer?
 21 **A. When I looked at the photograph on my**
 22 **computer.**
 23 **Q.** You could see -- this photograph does not
 24 have any area underneath the table. What did you
 25 see on your computer?

1 **A. It wasn't this photograph. It was a**
 2 **similar photograph that actually showed the ground**
 3 **underneath this table.**
 4 MS. POLK: Your Honor, counsel has stipulated
 5 to the admission of Exhibits 310 and 323.
 6 THE COURT: 310 and 323 are admitted.
 7 (Exhibits 310 and 323 admitted.)
 8 **Q.** BY MS. POLK: Detective, did you see a
 9 first-aid kit at the scene when you were processing
 10 the crime scene on October 9, 2009?
 11 **A. Yes.**
 12 **Q.** Where did you see it?
 13 **A. It was in that hydration station off to**
 14 **the right, just below the tables on the right-hand**
 15 **side.**
 16 **Q.** I'll put back up on the overhead
 17 Exhibit 318 and ask you whether or not the area
 18 where you saw the first-aid kit is depicted in this
 19 photograph.
 20 **A. It is.**
 21 **Q.** Can you show the jury where.
 22 **A. It's behind this chair.**
 23 **Q.** Where was it? Was it on the ground? the
 24 table?
 25 **A. It was on the ground. There was another**

1 **box with it. I don't remember -- there was a box**
 2 **of sage that was nearby. I can't remember which**
 3 **box was on top.**
 4 **Q.** The two boxes were on the ground?
 5 **A. Yes.**
 6 **Q.** I'm going to put up on the overhead
 7 Exhibit 323 and ask you to tell the jury what we're
 8 looking at. Do I have that upside down?
 9 **A. No. That's right.**
 10 **Q.** This way is right?
 11 **A. It's hard to tell because you're taking a**
 12 **picture straight down.**
 13 **Q.** I'll give it to you and see if you can
 14 orient it for me. Tell the jury what they're
 15 seeing in this photograph.
 16 **A. This is the first-aid kit.**
 17 **Q.** Was this photograph taken before it was
 18 moved?
 19 **A. Yes.**
 20 **Q.** Is this how you found it at the scene?
 21 **A. Yes.**
 22 **Q.** Did you then seize it?
 23 **A. Yes.**
 24 **Q.** And did you package it up?
 25 **A. Yes.**

1 **Q.** I'm going to put up on the overhead
 2 Exhibit 310. Is this how you packaged it up?
 3 **A. Yes.**
 4 **Q.** This package we see in the photograph --
 5 where did that come?
 6 **A. That box was the box that the first-aid**
 7 **kit was on.**
 8 **Q.** I'm going to put up on the overhead
 9 Exhibit 311 and have you tell the jury what they're
 10 seeing here.
 11 **A. That's the contents of the first-aid kit.**
 12 **Q.** Do you recall, Detective, whether any of
 13 the items had been opened that are shown in this
 14 photograph?
 15 **A. It did not appear to be.**
 16 **Q.** And tell the jury what this is.
 17 **A. That's a radio.**
 18 **Q.** And do you recall what this is?
 19 **A. I believe that was a clock, like an alarm**
 20 **clock.**
 21 **Q.** I'd like to ask you a couple questions,
 22 Detective, about the Department of Public Safety
 23 crime lab and how law enforcement agencies work
 24 with the crime lab.
 25 First of all, are you the same agency?

1 **A. No.**
2 **Q.** And do you know what agencies the state
3 crime lab works with?
4 **A. Pretty much all the agencies with the**
5 **exception of a couple.**
6 **Q.** All what agencies?
7 **A. All law enforcement agencies in Arizona**
8 **unless that agency has their own crime lab. There**
9 **is -- only Phoenix PD and Tucson PD have their own**
10 **crime labs.**
11 **Q.** And by "PD" you mean?
12 **A. Police department.**
13 **Q.** For Yavapai County and all the law
14 enforcement agencies here, what crime lab do they
15 work with?
16 **A. We use the Department of Public Safety**
17 **crime lab.**
18 **Q.** Does the crime lab test every item that
19 you request them to test?
20 **A. No.**
21 **Q.** Do you know how decisions are made to
22 determine what items will be tested by the crime
23 lab?
24 **A. Yes.**
25 **Q.** And based on your training and

1 experience, have you on other occasions had
2 discussions with the criminalists, the scientists
3 at the state crime lab regarding the decision to
4 test items?
5 **A. Yes.**
6 **Q.** And ultimately whose decision is it
7 whether or not an item will be tested?
8 **A. It's ultimately the DPS crime lab**
9 **decision.**
10 **Q.** Based on your training and experience,
11 are you familiar with the priorities that the state
12 crime lab uses in determining what they will test
13 and not test?
14 **A. To some extent, yes.**
15 **Q.** Could you explain that to the jury.
16 **A. They look at the severity of the crime,**
17 **the likelihood they're going to find evidence on**
18 **that item.**
19 MR. KELLY: Your Honor, I'm going to object to
20 the hearsay nature of the response.
21 THE COURT: Sustained as to foundation.
22 MS. POLK: Your Honor, I can move on.
23 THE COURT: Okay.
24 **Q.** BY MS. POLK: In this case, Detective,
25 did you have any conversations with the scientists

1 at the state crime lab about what items to test?
2 **A. Yes.**
3 **Q.** And, in general, when you're processing
4 the scene of homicide, are you as a law enforcement
5 officer able to talk to the technicians, the
6 criminalists, the scientists, at the state crime
7 lab to get guidance on what to collect, how to
8 collect it and ultimately what to test?
9 **A. Yes.**
10 **Q.** Can you describe generally for the jury
11 how that relationship works between a detective and
12 someone at the state crime lab.
13 **A. Usually what would happen is when they**
14 **get to our case, we will submit the evidence to the**
15 **DPS crime lab. When they get to our case, they**
16 **will call us, and we'll talk to the evidence and**
17 **determine what can be tested.**
18 **Q.** When you have those conversations, are
19 you drawing upon what you have learned at that
20 stage in any given investigation?
21 **A. Yes.**
22 **Q.** When the decision is made whether to test
23 an item, is that necessarily on the date that it's
24 submitted to the state crime lab?
25 **A. No.**

1 **Q.** And explain that to the jury.
2 **A. We send it to the crime lab. It's a**
3 **case-by-case basis. Sometimes it's several months**
4 **before they get to our case.**
5 **Q.** In this case were any items tested
6 immediately upon being sent to the state crime lab?
7 **A. No.**
8 **Q.** At the time decisions were being made
9 whether to test, had you learned more in this
10 investigation, without telling the jury what you
11 had learned?
12 **A. From the time I sent the items until the**
13 **time they tested?**
14 **Q.** The time they tested or decisions not to
15 test were made.
16 **A. Had I learned additional information?**
17 **Q.** Yes.
18 **A. Yes.**
19 **Q.** Can you tell the jury how it is that
20 items get from your evidence storage facility, your
21 secure facility, to the state crime lab?
22 **A. Yes.**
23 **Q.** Will you tell them?
24 **A. Yes. Usually I believe it's on Wednesday**
25 **one of our evidence techs, usually Ken Brewer -- he**

1 will drive to the Flagstaff Department of Public
2 Safety crime lab with our evidence. All the
3 evidence goes to the Flagstaff lab. And the
4 Flagstaff lab will send evidence down to the
5 Phoenix lab if it's evidence that the Phoenix lab
6 needs to test.

7 Q. Are you familiar with the term "chain of
8 custody"?

9 A. Yes.

10 Q. Will you tell the jury what that means.

11 A. With evidence somebody always has to be
12 the custodian of the evidence. Somebody is always
13 responsible for that piece of evidence. So anytime
14 it's passed on to somebody else, the date and time
15 is logged and then also the signature of the person
16 receiving it, and then when they give it to
17 somebody, the same thing happens.

18 Q. And logged where?

19 A. Logged on the evidence forms. We have
20 evidence sheets.

21 Q. And are those evidence sheets that remain
22 with that item?

23 A. More or less. They remain in a filing
24 cabinet in our evidence in Prescott Valley.

25 Q. At the secure facility?

1 A. Yes.

2 Q. And then copies are available, for
3 example, to you?

4 A. Yes.

5 Q. Detective, when we open packages for the
6 jury -- perhaps you can come down here and join me
7 again. The packages that you have opened -- have
8 been opening have tape on them. And then as the
9 jury can see, there is different initials that are
10 along the tape. Can you explain to the jury what
11 this is representing.

12 A. Yes. The person that sealed the
13 evidence, that they have the evidence and sealed
14 it, has to sign the envelope so you can tell that
15 the envelope has been opened or not.

16 Q. What happens when it is opened and then
17 resealed?

18 A. Then same thing happens. Most people put
19 the date, although we're not required to, and then
20 your initials.

21 Q. Every time this envelope, for example,
22 gets opened and then resealed, what happens?

23 A. It gets marked so you know whether
24 somebody has gotten into it.

25 Q. And is that logged on that log sheet that

1 you were talking about?

2 A. It is.

3 Q. Let's look at --

4 MR. KELLY: Judge, we stipulated the evidence.
5 And there is no chain of custody issue. I would be
6 willing to stipulate to more evidence if that's
7 what the focus is.

8 THE COURT: If that comes up.

9 Q. BY MS. POLK: Detective, with respect to
10 Exhibit 970, what you just told the jury about
11 sealing and unsealing and marking with initials --
12 do you see some of that on this exhibit?

13 A. Yes.

14 Q. Could you show the jury specifically.

15 A. Yes. You can see on the top, you mark
16 each side of the tape, and Ken Brewer that signed
17 this, and, basically, any seam you want to have
18 marked on both sides of the seam.

19 Q. On this particular item, if you and I had
20 been out at the evidence storage facility, if I
21 wanted to look at it, for example, you had opened
22 it for me, and then I said, thank you, and walked
23 away, what would you do?

24 A. We would then retape it and remark it.

25 And we would also log that on the evidence sheet

1 that it had been taken out of evidence for review.

2 Q. And who would be the person who initials
3 after you retape it?

4 A. Depends on who is pulling it out of
5 evidence. In this particular case, this was taken
6 out by Ken Brewer. It was originally sealed by Ken
7 Brewer and taken out by Ken Brewer so that we could
8 view it.

9 Q. On October 14 of 2009, Detective, did you
10 have a conversation with personnel at the Arizona
11 state crime lab about items that you had seized in
12 this case? And that's just a yes or no.

13 A. I know somebody from our office did on
14 October 14. I can't remember if it was me or if it
15 was Ken Brewer.

16 Q. Did you have conversations -- and Ken
17 Brewer is who?

18 A. One of our evidence technicians.

19 Q. Were you consulting with Ken Brewer and
20 others about the items that you had seized at the
21 scene?

22 A. Yes.

23 Q. What were you consulting about?

24 A. About what the lab could test for,
25 passing information on to the lab as far as what we

1 have at the scene, the types of toxins that could
2 have caused these injuries, things like that.

3 Q. What were the questions that you had --
4 what was the decision you were making on or around
5 October 14 with respect to the state crime lab?

6 A. It was how to go about testing. I was in
7 communication with one of the supervisors at the
8 crime lab -- it was around October 14 -- explaining
9 to the crime lab witness statements, what we had
10 seen at the scene, what the injuries were, what
11 toxins or volatiles could have possibly caused
12 this, how to test the items seized, what items were
13 seized, that sort of thing.

14 Q. Did you specifically request whether the
15 items could be tested?

16 A. Yes.

17 Q. And what did you tell the crime lab that
18 you might want to test for?

19 A. I said that we had taken cross-sections
20 cut out of the tarps and blankets, all the
21 coverings, and we wanted to test that for any of
22 type of volatiles. And also the wood used to heat
23 the rocks to see if there was a volatile there, the
24 wood inside the sweat lodge and also the soil
25 inside the sweat lodge.

1 Q. And your question to the crime lab was
2 whether they could test for -- did you use the word
3 "volatile"?

4 A. I used the word "toxins." And they
5 corrected me and said, no. We use the word
6 "volatiles."

7 Q. Did you come to learn what the term
8 "volatile" means?

9 A. Yes.

10 Q. What did you learn that it means to you?

11 A. That a volatile is chemical or toxin
12 that's released off of an object once it's heated.

13 Q. Is it necessarily toxic?

14 A. No.

15 Q. Did the lab indicate to you whether or
16 not they could test these items for volatiles?

17 A. They did.

18 Q. And did you learn that they could test
19 for volatiles?

20 A. Yes.

21 Q. Was there further decisions that needed
22 to be made to determine what sort of tests to run?

23 A. Yes.

24 Q. And specifically what?

25 A. There was quite a bit of discussion about

1 the materials that we had taken. And the lab
2 explained that different volatiles would be
3 found -- you know -- pretty much guaranteed because
4 there is plastic tarps involved. And they were
5 asking what temperatures we thought the tarps had
6 gotten to.

7 Q. Did you know at that time or do you know
8 today what temperature was present in the sweat
9 lodge on October 8, 2009?

10 A. I don't know.

11 Q. Did you have any way to calculate a
12 temperature from inside Mr. Ray's sweat lodge
13 ceremony?

14 A. No. It's something that we wanted and we
15 wanted to figure out what the temperature could
16 have been based on the number of rocks and the
17 amount of water, all the different variables.
18 There were just too many variables to come up with
19 an estimate of what the temperature could be.

20 Q. Did you have a discussion, then, with the
21 criminalists at the state crime lab about -- did
22 you provide to the crime lab information about the
23 scene directly on this topic of how hot the sweat
24 lodge had gotten?

25 A. Yes.

1 Q. And did what did you tell the crime lab?

2 A. I told the crime lab what was said by
3 Mr. Ray prior to going into the sweat lodge and
4 what the witnesses testified to.

5 Q. Did you give the crime lab specific
6 information about what you had learned from what
7 witnesses said?

8 A. Yes.

9 Q. And do you recall specifically what you
10 told the crime lab today?

11 MR. KELLY: Your Honor, it's requesting a
12 hearsay response, lack of foundation. All the
13 other objections I'm raising.

14 THE COURT: Ms. Polk.

15 MS. POLK: Your Honor, do you want a sidebar?

16 THE COURT: No.

17 Go ahead and respond if you can.

18 MS. POLK: The crime lab ultimately tested at
19 two different temperatures based on this
20 information that this witness gave them. It's not
21 offered to prove what the temperature in the sweat
22 lodge was.

23 THE COURT: This relates to 2009?

24 MS. POLK: 2009 only.

25 THE COURT: Mr. Kelly?

1 MR. KELLY: I'll stipulate to the admission of
2 Exhibit 345, which is the Department of Public
3 Safety scientific examination report signed by
4 Ms. Dawn Sy, as well as the communications log
5 which we obtained associated with that document,
6 which has been marked as Exhibit 584.

7 MS. POLK: Your Honor, I'll accept the
8 stipulation as to the temperatures that the crime
9 lab tested at. But what's relevant is what
10 information the crime lab had when they decided
11 what the two temperatures would be that they ran
12 the tests at.

13 MR. KELLY: Judge --

14 THE COURT: Counsel, please approach.
15 (Sidebar conference.)

16 MR. KELLY: Judge, here's the problem: The
17 communications log, which I have no objections to
18 its admission, the response from DPS is we could
19 not -- the rocks and tarps could not get to the
20 temperature it would be while it was burning.
21 Apparently it's implying that the crime lab was not
22 able to -- and based on the detective's testimony,
23 no one knows the exact temperature. And they said
24 their crime lab equipment could not get it to the
25 temperatures it was while it was burning.

1 The exhibit speaks for itself. I don't
2 have an objection to admitting that. But this is
3 some attempt to open the door as to the prior acts,
4 and the relative heat between sweat lodge, that's
5 my concern.

6 The DPS crime lab report does have the
7 two relevant temperatures mentioned by Ms. Polk.
8 And I have no objection to the admission of that
9 document, show it to the jury explaining that's
10 what they heated it to and the result. Those are
11 the facts.

12 My concern is the prior acts.

13 MS. POLK: Let me respond to several points
14 raised.

15 First of all, that log that Mr. Kelly
16 just quoted from, again, is taking something out of
17 context, which is why I'm so reluctant to have
18 information come in in the form of a written report
19 without the witness testifying.

20 The state will call Dawn Sy. I do not
21 accept an agreement to stipulate to these notes
22 that she's taken for precisely this reason, the
23 taking comments out of context. She'll come and
24 explain.

25 The second issue is I have no intention

1 of doing any sort of comparison to prior sweat
2 lodges. The decision was made to test at two
3 different temperatures. And the decision was made
4 by the crime lab, not by this detective, after
5 hearing what this detective had to say.

6 And then we have items that are tested at
7 about 122 degrees Fahrenheit and 202 degrees
8 Fahrenheit. That's a decision made by the crime lab
9 after hearing what this witness had to say.

10 When the criminalist from the state crime
11 lab takes the stand and I'm asking her how did you
12 decide, she's going to say based on what she was
13 told. And at that point it would be hearsay. But
14 this is the witness that told her the information.

15 MR. KELLY: Judge, that was just an offer to
16 admit 584. That's fine. I'll withdraw it. If
17 he's going to say based on his investigation
18 in 2009, they determined these temperatures, I
19 don't have an objection. But I maybe misunderstood
20 the question and the answer. I thought he was
21 going to go into prior sweat lodges.

22 THE COURT: I don't think it's going to be
23 prior sweat lodges at all. I think it's going to
24 be this is the information we believe we have, and
25 then he got their response as to what they thought

1 they should do.

2 MS. POLK: I want the witness to give the
3 words, say what he told the criminalist, which is
4 that participants were told that they would be so
5 hot, their skin would feel like it was going to
6 peel, the symptoms that he described in terms of
7 vomiting and other information he had learned, so
8 that the jury knows what the information is that
9 the criminalist had when the decision was made to
10 test at these two temperatures. I'm not going to
11 talk about prior sweat lodges.

12 MR. KELLY: Thank you.

13 THE COURT: That's what I thought. That's
14 permissible, of course.

15 (End of sidebar conference.)

16 THE COURT: Ms. Polk.

17 Q. BY MS. POLK: Detective, in the
18 conversation that you had with the representative
19 from the state crime lab, ultimately who made the
20 decision about the temperatures that items seized
21 would be tested at?

22 A. The crime lab did.

23 Q. And before the personnel from the crime
24 lab made that decision, did you provide them with
25 specific information that you had learned during

1 your investigation about what either Mr. Ray had
2 said or participants -- witnesses had said to you?

3 **A. I did.**

4 **Q.** And will you tell the jury with respect
5 to the event that occurred on October 8 of 2009,
6 first of all, what comments did you give to the
7 state crime lab that had been made by Mr. Ray that
8 you had learned from your witness interviews.

9 **A. That it had been extremely hot inside,
10 that witnesses -- that participants were told they
11 would enter an altered state or be in an altered
12 state, that it would be so hot it would feel like
13 their skin would split, that they would think
14 they're going to die, but they're not going to die.**

15 **Q.** Did you also provide information to the
16 crime lab about the symptoms that participants had
17 experienced during or after Mr. Ray's sweat lodge
18 ceremony?

19 **A. Yes.**

20 **Q.** Do you recall what you told the crime lab
21 personnel?

22 **A. Obviously that the two people had died.
23 At that point the third person had died. That
24 people had passed out inside the sweat lodge. That
25 people were in various stages of medical distress.**

1 **Q.** Do you recall whether or not you shared
2 information about anybody vomiting?

3 **A. Yes.**

4 **Q.** During that discussion did you provide
5 any information to the personnel from the DPS crime
6 lab about specific toxins to test for?

7 **A. No.**

8 **Q.** And why not?

9 **A. Because I didn't know what toxins could
10 cause these symptoms. And there weren't -- there
11 wasn't an indication of any specific toxins
12 present.**

13 **Q.** Based on your investigation?

14 **A. Yes.**

15 **Q.** Did you discuss with the state crime lab
16 about any specific toxins to test for?

17 **A. No.**

18 **Q.** Did they provide to you any guidance or
19 information about what toxins they might test for
20 based on the information you had given them?

21 **A. No.**

22 **Q.** Were they able to?

23 **A. No.**

24 **Q.** Did you then have a discussion with the
25 crime lab about -- at some point had you discussed

1 with the crime lab in what containers items should
2 be submitted to the state crime lab for possible
3 testing?

4 **A. I did not have those discussions with the
5 crime lab. Those discussions were Ken Brewer.**

6 **Q.** Ultimately, Detective, do you know what
7 items were tested by the state crime lab?

8 **A. Yes.**

9 **Q.** Are you able to tell the jury?

10 **A. If I can refer to the lab report.**

11 **Q.** Would that refresh your recollection?

12 **A. It would.**

13 **Q.** Go ahead and do that.

14 MR. KELLY: Judge, again, I would agree to the
15 admission of Exhibit 345.

16 THE COURT: Ms. Polk.

17 MS. POLK: Your Honor, the state prefers to
18 wait until the author of the report is here to
19 testify.

20 **Q.** Can you tell the jury whether any rocks
21 were tested? I don't want you to talk about
22 results, Detective, but just what was tested by the
23 state crime lab.

24 **A. Yes. There were two rocks that were
25 tested.**

1 **Q.** Were any of the coverings tested?

2 **A. Yes.**

3 **Q.** And how many?

4 **A. Two of the paint cans with the coverings
5 were tested.**

6 **Q.** With respect to the four logs that were
7 seized, were any of those tested?

8 **A. Yes.**

9 **Q.** And how many?

10 **A. Two of the four that we sent were tested.**

11 **Q.** And after testing were all of those items
12 returned to the Yavapai County Sheriff's Office
13 storage facility?

14 **A. Yes.**

15 **Q.** And all of those items remain available?

16 **A. Yes.**

17 **Q.** At the time that you had a discussion
18 with the state crime lab about testing of the
19 tarps, did you know whether the tarps got hot
20 during Mr. Ray's sweat lodge ceremony?

21 **A. No.**

22 **Q.** And at what point in the investigation
23 was the decision made to go ahead and test the
24 samples of the sweat lodge covers?

25 **A. It was pretty early on.**

1 Q. At the time that you made the decision
2 along with the state crime lab to test the sample
3 coverings, did you -- were you in possession of
4 information indicating that there would be some
5 positive findings?

6 A. Yes. There was quite a bit of discussion
7 about testing the tarps. They were reluctant to do
8 so because there would be so many spikes of
9 volatiles from the test. And there was a lot of
10 discussion back and forth whether or not to even
11 test because we didn't know if it would be useful.
12 I asked if they could explain all those spikes, and
13 they indicated they probably could.

14 Q. And what do you mean by a "spike"?

15 A. A spike would be -- it's a chart that
16 they use. And I'm not that familiar with their
17 technology or their machines that they use to test
18 this stuff. But once their machine detects a
19 certain volatile on the carbon strip, it will
20 spike.

21 Q. With respect to the soil samples that you
22 had seized, those were not among the items that
23 were ultimately tested by the state crime lab?

24 A. No, they weren't.

25 Q. When was that decision made?

1 A. I don't recall. I sent them to be
2 tested. And I wanted them to be tested. And at
3 some point they decided not to test them, and they
4 sent them back.

5 Q. When you got them back, at some point
6 could you still have them tested?

7 A. Yes.

8 Q. Was a decision made not to test the soil
9 samples?

10 A. Yes.

11 Q. Do you recall approximately when that
12 was?

13 A. If I can look at my time line, I can tell
14 you about when that was.

15 Q. Let me ask you this: Had you met with
16 various members of the prosecution team when that
17 decision was made?

18 A. Yes.

19 Q. Had you met with a medical examiner who
20 had performed the autopsies on the three victims?

21 A. Yes.

22 Q. Had you met with other members of your
23 law enforcement agency?

24 A. Yes.

25 Q. And do those soil samples remain

1 available?

2 A. Yes.

3 MR. KELLY: Judge, we need to approach very
4 briefly, please.

5 THE COURT: Okay.

6 (Sidebar conference.)

7 MR. KELLY: Judge, my concern is that repeated
8 final question, do these samples remain available?
9 That's an implication of improper shifting of the
10 burden of proof. Mr. Ray doesn't have any burden
11 to test any of these samples.

12 So when it's asked, do they remain in the
13 lab, I have no problem. But available. That
14 implies they're available to the defense, and we
15 didn't test them. Thus, somehow we haven't met our
16 burden. That's highly improper. I'd ask that the
17 final question be eliminated from further inquiry
18 by Ms. Polk.

19 MS. POLK: Your Honor, it is not a shifting of
20 the burden of proof. And I can provide the Court
21 and counsel with two cases that are right on point
22 during the break if he would like.

23 THE COURT: Overruled. The question stands as
24 it goes now. Thank you.

25 (End of sidebar conference.)

1 Q. BY MS. POLK: Detective, yesterday in
2 this courtroom an audio clip was played. And it
3 was Exhibit 742. Do you recall the playing of that
4 audio clip yesterday?

5 A. Not really.

6 Q. It pertained to -- it was a reference to
7 organophosphates.

8 A. Oh, yes.

9 Q. And the witness was Amayra Hamilton. Do
10 you recall that?

11 A. Yes.

12 Q. And her testimony was that she was in the
13 dining room where participants had gathered late in
14 the evening of October 8, 2009.

15 Do you recall that?

16 A. Yes.

17 Q. Were you present then?

18 A. No.

19 Q. And do you know whether members from your
20 office were present?

21 A. Yes.

22 Q. Do you know who was present from your
23 office?

24 A. I don't know who was present inside of
25 the cafeteria. But I know we had several

1 **detectives that were on scene.**

2 **Q.** Do you have a detective named
3 Detective Wendy Parkison?

4 **A. Yes.**

5 **Q.** Was she on the scene?

6 **A. Yes.**

7 **Q.** Do you know, Detective, after talking to
8 the other detectives and law enforcement officers
9 in the case, how long representatives from your
10 office were in the dining room after the events
11 that occurred in the defendant's sweat lodge that
12 evening?

13 **A. Yes. It was several hours from --**
14 **shortly after the incident up until about 2:00 in**
15 **the morning.**

16 **Q.** During that time do you know, based on
17 your position as case agent, whether or not
18 interviews were being done in the dining room?

19 **A. Yes.**

20 **Q.** Were they being recorded?

21 **A. Yes.**

22 **Q.** Do you know that particular clip that was
23 played for the jury by the defense yesterday, was
24 that one of those recordings provided to them by
25 the detectives in this case?

1 **A. Yes.**

2 **Q.** Detective, has the speaker who made that
3 reference and --

4 With Mr. Kelly's permission, I'll read
5 the portion that was played for the jury yesterday,
6 Your Honor?

7 MR. KELLY: No objection.

8 **Q.** BY MS. POLK: It starts on page 8. I'm
9 just reading from the transcript that is marked as
10 Exhibit 692.

11 On page 8, line 26, it says, unknown
12 male: -- actually, above that it says, interview
13 interrupted. Unknown male: All right. Everybody
14 who is in the sweat lodge tonight, if you're not
15 going to the hospital, just want everybody to keep
16 an eye on each other tonight. Okay? Everyone --
17 and it's inaudible. We're not exactly sure why.
18 Could have been some carbon monoxide with maybe
19 some organophosphates maybe that were mixed in
20 somehow. So we're checking into that.

21 My first question, Detective, is whether
22 this information is consistent with the initial
23 crime scene?

24 MR. KELLY: Your Honor, objection. Form of
25 the question.

1 MS. POLK: Your Honor, that was a poor
2 question. I can try and do better.

3 THE COURT: Please.

4 **Q.** BY MS. POLK: When you first were
5 assigned to the case, you talked about the events
6 of October 9, did you know what had caused the
7 three deaths?

8 **A. No.**

9 **Q.** And initially just knowing that people
10 had fallen ill, what was your initial assessment?

11 **A. My initial thought --**

12 **Q.** This is before any interviews and
13 information gathering.

14 **A. My initial thought when I'm driving**
15 **there, all I know is that people died in the sweat**
16 **lodge. I'm thinking carbon monoxide. But that was**
17 **ruled out.**

18 MR. KELLY: Your Honor, I'm going to object to
19 the second portion of his answer.

20 THE COURT: Sustained.

21 **Q.** BY MS. POLK: This unknown male. Has
22 that person ever been identified -- that speaker?

23 **A. No.**

24 **Q.** Do you know who that speaker was?

25 **A. I don't.**

1 **Q.** Throughout the course of your
2 investigation, did anybody else from your office
3 from the Yavapai County Sheriff's Office ever come
4 forward with further information indicating that
5 the victims had been exposed to organophosphates?

6 **A. No.**

7 **Q.** And throughout the course of your
8 investigation, or the course of this case, did
9 anybody from any of the fire departments ever come
10 forward with information indicating that the
11 victims had been exposed to organophosphates?

12 **A. No.**

13 **Q.** Throughout the course of your
14 investigation --

15 MR. KELLY: Judge, I'm going to object to the
16 form of the question.

17 THE COURT: Overruled.

18 **Q.** BY MS. POLK: Throughout the course of
19 your investigation and the course of this case, did
20 anybody from any of the paramedic units that
21 responded to the scene ever come forward with
22 information that the victims had been exposed to
23 organophosphates?

24 **A. No.**

25 **Q.** And throughout the course of this

1 investigation and this case, did any medical
2 doctors ever come forward with information that the
3 victims had been exposed to organophosphates?

4 **A. No.**

5 MR. KELLY: Judge, object to the form of the
6 question. It's leading, misstates the evidence in
7 this case. The evidence has been admitted.

8 THE COURT: Overruled.

9 **Q. BY MS. POLK: Detective, how many -- for**
10 **how many months did you conduct an investigation**
11 **before the defendant was charged with the three**
12 **counts of manslaughter?**

13 **A. About four months.**

14 **Q. Did this case receive some publicity --**
15 **widespread publicity during those four months?**

16 **A. Yes.**

17 **Q. Were you contacted by -- were you ever**
18 **contacted by members of the public, where you**
19 **didn't initiate the contact, with information about**
20 **the case?**

21 **A. Oh, definitely.**

22 **Q. And on how many occasions?**

23 **A. For months every time I'd go into my**
24 **office, there were multiple messages from different**
25 **people.**

1 **Q. And from any of those messages, did**
2 **anybody ever convey to you any information that**
3 **would suggest that the victims had been exposed to**
4 **organophosphates?**

5 **A. No.**

6 MR. KELLY: Your Honor, withdraw my objection,
7 Judge.

8 THE COURT: Continue, Ms. Polk.

9 **Q. BY MS. POLK: Detective, that reference I**
10 **just read for the jury: That we're not exactly**
11 **sure why. Could have been some carbon monoxide**
12 **with maybe some organophosphates maybe that were**
13 **mixed in somehow. So we're checking into that.**

14 **Did anybody ever come forward and**
15 **indicate to you that they had found some evidence**
16 **to suggest after checking into it that the victims**
17 **had been exposed to organophosphates?**

18 **A. No.**

19 MR. KELLY: Objection to the form of the
20 question, lack of foundation.

21 THE COURT: Overruled.

22 **Q. BY MS. POLK: What was your answer?**

23 **A. My answer was no.**

24 **Q. Throughout the entire course of your**
25 **investigation, did anyone ever mention to you**

1 organophosphates poisoning as a possible cause for
2 the death of the three victims, throughout the
3 course of the investigation?

4 **A. Yes.**

5 **Q. We'll come back to that.**

6 **Did you ever mention the possibility of**
7 **organophosphates poisoning to the medical examiners**
8 **in this case?**

9 **A. No.**

10 **Q. Why not?**

11 **A. There was no indication of that.**

12 MR. KELLY: Your Honor, objection to the
13 response. It's conclusionary in nature.

14 THE COURT: Sustained.

15 **Q. BY MS. POLK: Detective, if you had had**
16 **information suggesting that the victims had been**
17 **exposed to organophosphates, would you have**
18 **provided that to the medical examiners?**

19 **A. Yes.**

20 **Q. On May 20 of 2010, did you have a meeting**
21 **with the defense attorneys in this case?**

22 **A. Yes.**

23 **Q. And at that time were the various items**
24 **that had been seized by you in this case -- did you**
25 **show them, those items, to the defense attorneys?**

1 **A. I did.**

2 **Q. How long did you meet with the defense**
3 **attorneys?**

4 **A. I believe it was that full day. We**
5 **didn't even take a lunch break.**

6 **Q. Did you go through all the items that**
7 **were seized from the scene?**

8 **A. Most of them.**

9 **Q. And were boxes opened and items shown to**
10 **the defense attorneys?**

11 **A. Yes.**

12 **Q. Were you subsequently interviewed by**
13 **Mr. Li?**

14 **A. Yes.**

15 **Q. Do you recall the date?**

16 **A. No. But I can look in my time line.**

17 **Q. Will you do that?**

18 **A. Yes. June 16, 2010.**

19 **Q. And during that interview by Mr. Li, did**
20 **he ever ask you whether you had found evidence of**
21 **organophosphate poisoning?**

22 **A. No.**

23 **Q. Did he ever mention that word to you?**

24 **A. No.**

25 **Q. And during that interview, did Mr. Li ask**

1 you whether the victims had been exposed -- whether
2 you had found evidence that victims had been
3 exposed to other chemicals at the crime scene?

4 **A. No.**

5 **Q.** Going back to May 20, when you spent the
6 day showing the defense attorneys the evidence that
7 had been seized, were you ever asked by any of them
8 whether you had found any evidence of
9 organophosphate poisoning at the crime scene?

10 **A. No.**

11 **Q.** Were you ever asked at that time whether
12 you had found any evidence of other chemical
13 poisoning of the victims?

14 **A. No.**

15 **Q.** Do you recall a second interview by the
16 defense team that occurred on November 17, 2010,
17 after this Court had ruled on a legal dispute
18 between the parties?

19 **A. Yes.**

20 **Q.** Do you recall which attorney conducted
21 that interview?

22 **A. I believe it was Truc Do.**

23 **Q.** And during that interview, were you asked
24 by Ms. Do or any of the defense attorneys whether
25 you had found any evidence that the victims had

1 been exposed to organophosphates?

2 **A. No.**

3 **Q.** Was that word even mentioned to you then?

4 **A. No.**

5 **Q.** During that interview on November 17,
6 2010, were you asked by Ms. Do or any other defense
7 attorney present whether you had found evidence of
8 exposure to other chemicals such as rat poison?

9 **A. I don't think so.**

10 **Q.** Were you, as the case agent, Detective --
11 were you present when Mr. Li or Ms. Do interviewed
12 the other detectives in this case?

13 **A. Yes.**

14 **Q.** Can you tell the jury the names of the
15 other detectives that were interviewed.

16 **A. Yes. Lieutenant Boelts, who was Sergeant**
17 **Boelts at the time of this incident, and**
18 **Detective Poling. And also -- I believe he was a**
19 **lieutenant. Lieutenant Rhodes at the time.**

20 **Q.** What was the date that Lieutenant Boelts
21 was interviewed?

22 **A. It was June 16, 2010.**

23 **Q.** Were you present for that interview?

24 **A. Yes.**

25 **Q.** And did the defense attorneys ask

1 Lieutenant Boelts whether there was any evidence
2 that the victims had been exposed to
3 organophosphates?

4 **A. No.**

5 **Q.** Was that word mentioned in that interview
6 at all?

7 **A. No.**

8 **Q.** Was Lieutenant Boelts interviewed a
9 second time after the legal dispute was resolved --
10 was he interviewed a second time on November 17
11 of 2010?

12 **A. Yes.**

13 **Q.** Were you present for that interview?

14 **A. Yes.**

15 **Q.** Did the defense attorneys ask
16 Lieutenant Boelts in that interview whether there
17 was any evidence that the victims had been exposed
18 to organophosphates?

19 **A. No.**

20 **Q.** In either of those interviews, was that
21 word even mentioned?

22 **A. No.**

23 **Q.** Were you present when Detective Poling
24 was interviewed on June 16, 2010, by the defense
25 attorneys?

1 **A. Yes.**

2 **Q.** And did the defense attorneys ask
3 Detective Poling during that interview whether or
4 not there was any evidence that -- any evidence of
5 organophosphates with respect to this crime scene?

6 **A. No.**

7 **Q.** And was that word even mentioned?

8 **A. No.**

9 **Q.** Were you present when Detective Rhodes
10 was interviewed on November 17, 2010, by the
11 defense attorneys?

12 **A. Yes.**

13 **Q.** And did the defense attorneys ask
14 Detective Rhodes anything about organophosphates or
15 organophosphate poisoning?

16 **A. No.**

17 **Q.** Was that word even mentioned?

18 **A. No.**

19 **Q.** Were you present when the medical
20 examiners in this case were interviewed?

21 **A. Yes.**

22 **Q.** Were you present when Dr. Fischione of
23 the Maricopa County Medical Examiner's Office was
24 interviewed by the defense attorneys on June 17,
25 2010?

1 **A. Yes.**

2 MR. KELLY: Your Honor, object to this line of
3 questioning.

4 THE COURT: Overruled.

5 **Q.** BY MS. POLK: During that interview, did
6 the defense attorneys ask Dr. Fischione -- did they
7 ask Dr. Fischione anything at all about the
8 possibilities of organophosphate poisoning?

9 **A. No.**

10 **Q.** Was that word mentioned at all or used at
11 all in that interview?

12 **A. No.**

13 **Q.** Were you present when Dr. Fischione was
14 interviewed a second time by the defense team after
15 the resolution of the legal dispute on January 7,
16 2011?

17 **A. Yes.**

18 **Q.** During that interview, did the defense
19 attorneys ask Dr. Fischione anything about the
20 possibility of organophosphate poisoning?

21 **A. No.**

22 **Q.** Did they use at that word at all?

23 **A. No.**

24 **Q.** Were you present when Dr. Lyon, also of
25 the Maricopa County Medical Examiner's Office, was

1 interviewed by the defense attorneys on June 17,
2 2010?

3 MR. KELLY: Objection. Calls for a hearsay
4 response of a witness who testified in this court.

5 THE COURT: Go ahead and take the afternoon
6 recess at this time.

7 Thank you, ladies and gentlemen. Please
8 remember the admonition. Please be reassembled at
9 quarter till. That will be about 20 minutes. And
10 we'll be in recess.

11 The parties will remain.

12 And, Detective, you may step down, too.

13 (Proceedings continued outside presence
14 of jury.)

15 The record will show that the jury has
16 left the courtroom.

17 Mr. Kelly.

18 MR. KELLY: Judge, I've never quite seen this
19 line of questioning. I believe it improperly is
20 attempting to shift the burden of proof onto the
21 defense or somehow imply that they've not been
22 straightforward or honest in terms of our
23 disclosure requirements under Rule 15. And it
24 delves into the strategy that we've incorporated
25 throughout the course of our pretrial preparation.

1 And I would remind the Court, Judge, that
2 on March 31, 2011, Dr. Robert Lyon testified in
3 this courtroom that he could not exclude
4 organophosphates. That's the evidence before this
5 jury, not some hearsay or response based on a
6 two-party conversation between defense attorneys
7 and other potential witnesses overheard by
8 Detective Diskin. That's highly improper.

9 We have pending before the Court several
10 instructions, cautionary instructions, we'd ask
11 that the Court provide to the jury as to the nature
12 and purpose of this type of evidence.

13 It has great potential to mislead the
14 jury and has limited probative value. I believe
15 there is requests filed by Mr. Li that are still
16 pending.

17 THE COURT: There are --

18 MR. KELLY: -- further --

19 THE COURT: In the motion for sanctions, they
20 were gathered there. They were provided at the
21 time of the motion for mistrial. There was kind of
22 a draft form provided at that time.

23 MR. LI: Yes.

24 THE COURT: I'm aware of that. And I don't
25 know that the response is coming with regard to the

1 motion for sanction in terms of writing. But I'm
2 aware of those.

3 MR. LI: I think one of the critical points
4 that we attempted to make in those briefs -- and
5 I'll be quick -- is that the state bears the burden
6 of proof as to all elements including causation.

7 I think one of the problems we've been
8 having here is that the state keeps on imposing,
9 suggesting, that we as the defense have some
10 burden, that it's some sort of one side or the
11 other wins on it.

12 The state has the burden beyond a
13 reasonable doubt to prove causation. We have, I
14 think, through the medical examiner demonstrated
15 that there is reasonable doubt. The medical
16 examiners cannot rule that out.

17 And so this suggestion that somehow the
18 defense bears some sort of burden needs to be
19 corrected in front of this jury. And that's why
20 we've been asking for that particular instruction
21 for the last several weeks as we've been going
22 through these causation issues.

23 Because it is critical that they
24 understand as Ms. Polk goes through this litany of
25 questions or whatever sort of questions she wants

1 to ask with this particular detective about the
2 investigative steps that he took, that this jury
3 understands what the burden is. The state bears
4 the burden.

5 We've been asking for that specific
6 instruction about causation. We think it's
7 critical that it be given now in light of all of
8 these questions that the state has offered, which
9 we believe are burden shifting.

10 And we've made our record on that point.
11 I won't argue it again. But I think it's critical
12 that the jury be instructed that the state bears
13 the burden.

14 THE COURT: Ms. Polk.

15 MS. POLK: Your Honor, with response to the
16 pending motion for sanctions, the motion for
17 mistrial, the motion for jury instructions based on
18 that, the state, if we haven't already, will be
19 filing responses. We will be requesting an
20 evidentiary hearing at which Rick Haddow will
21 testify.

22 This is kind of a side issue. But the
23 defense has again based on hearsay argued motions
24 to the Court, argued for jury instructions, argued
25 for sanctions against the state. And it's based on

1 hearsay.

2 What is entirely appropriate is to bring
3 the witness in so that the witness can testify and
4 can be cross-examined and confronted, and it can be
5 fleshed out what that witness really has to say and
6 what that witness's opinions are.

7 That's kind of a side issue. But that
8 was raised, that motion. And the state will be
9 requesting an evidentiary hearing.

10 On the issue of causation, I agree that
11 the jury instructions to the jury is very critical.
12 And it's appropriately given at the time when they
13 will be instructed with respect to all the law. We
14 always give them jury instructions on causation.
15 There are some very good uniform jury instructions
16 on the issue of causation, and they will be
17 appropriate. But I believe the jury instructions
18 issue needs to be argued at another time.

19 THE COURT: I think Mr. Li is referring
20 specifically to the burden of proof instruction
21 that was proposed at the time and in early April
22 where I ruled that causation evidence was coming
23 in. Actually, I ruled before that. I don't want
24 to go into all that history again. But that's when
25 I think it was first proposed. I think that's a

1 specific instruction that's being suggested now.

2 And this is the issue I want to talk
3 about. This is an unusual line of questioning,
4 Ms. Polk. And Mr. Kelly's objection is suggesting
5 it's shifting the burden. That's the argument.
6 I'd like your response.

7 MS. POLK: Your Honor, it's not shifting the
8 burden. It is, indeed, strategy by the defense
9 team to not raise this issue of organophosphates
10 with all these witnesses that they interviewed;
11 with this detective, that they had three different
12 contacts with, two interviews and looking at the
13 evidence, to intentionally not ask this witness
14 about organophosphates.

15 They have made this detective's
16 investigation the focus of their defense and have
17 repeatedly suggested to the jury, both in opening
18 statement and through the examination of witnesses,
19 that this was an inadequate investigation and
20 specifically highlighting this issue of
21 organophosphates.

22 They succeeded yesterday in getting in
23 this statement, which is hearsay. The speaker is
24 unknown. The state has no opportunity to
25 cross-examine the person who made that statement to

1 find out what the basis was for mentioning the
2 possibility of organophosphates being mixed in and
3 that he would check into it.

4 But now they succeeded in getting that
5 in. The state has no opportunity to cross-examine
6 or further find out anything about that statement.
7 That's now in front of the jury.

8 It is appropriate for this witness to
9 explain to the jury when it was the first time that
10 he hears about organophosphates.

11 The defense has made his investigation
12 the focus of their defense. And one of the things
13 that they have challenged is this witness's failure
14 to do an investigation into whether or not there is
15 organophosphate poisoning.

16 It is appropriate for this witness to
17 explain to the jury when it was after being case
18 agent, after conducting hundreds of hours of
19 witness interviews, sitting through defense
20 interviews, to find out when is the first time that
21 he hears about organophosphates.

22 Because the first time comes -- and we'll
23 hear it from the witness -- the first time comes
24 during the state's interview of Dr. Paul, the
25 defense expert. There is no reference in

1 Dr. Paul's report to organophosphates. And it's
2 only when Mr. Hughes is questioning Dr. Paul that
3 Dr. Paul towards the end of the interview mentions
4 the possibility of organophosphates.

5 At that point, and I believe the date is
6 January 31 of 2011, which is about two weeks before
7 the trial starts, the state hears for the first
8 time some suggestion of organophosphate poisoning.
9 The state then takes action.

10 This witness will testify about it, how
11 he contacted the medical examiners, and the
12 decision was made to have the blood samples of the
13 two victims -- this is Kirby Brown and James Shore.
14 To have those samples sent to the lab.

15 The lab tests -- the lab results are
16 negative. But then the state learns those results
17 are probably not reliable because of the length of
18 time that had passed.

19 There is no -- when the medical examiners
20 were interviewed by the defense team, there was no
21 information offered to them about the possibility
22 of organophosphates from the defense. None from
23 the state because it was a word that the
24 detective -- had never been mentioned to him.

25 And yet when the medical examiners have

1 testified in this trial, the defense has confronted
2 them with all this information. They characterize
3 all this information that they were never given by
4 the state.

5 This witness is explaining why this
6 information was never given to the medical
7 examiners, because it was not any information he
8 had ever heard about.

9 So, again, this comes in to explain the
10 course of the investigation; why this detective did
11 what he did; and why, when the jury is hearing
12 about organophosphates, why today all we have are
13 results from tests that probably are not reliable.

14 With respect to the issue of burden
15 shifting, Your Honor, I have two cases that are on
16 point. The first is -- it's State ex rel.
17 McDougall v. Corcoran. The cite is 153 Ariz. 157,
18 735 P.2d 767. This is a 1987 Arizona Supreme Court
19 decision.

20 And then the second case, which cites the
21 first case, is State v. Lehr. The cite is 201
22 Ariz. 509, 38 P.3d 1172. And it's a case from
23 2002.

24 These two cases involve behavior that is
25 much more pointed, questioning much more direct

1 than what I have done here today. Both of these
2 cases are cases where the prosecutor brought out
3 the fact that samples were not tested by the
4 defense. And then an argument to the jury argued
5 that the defense had access or in one case actually
6 had their own samples -- it was a DUI case -- had
7 their own samples and chose not to test. Both of
8 these cases stand for the proposition that it is
9 not a burden shifting.

10 If I can quote from the McDougall v.
11 Corcoran case. It states here that even when the
12 defendant does not take the stand, the prosecutor
13 may properly comment on the defendant's failure to
14 present exculpatory evidence which would
15 substantiate defendant's story as long as it does
16 not constitute a comment on defendant's silence.

17 Such comment is permitted by the
18 well-recognized principle that the nonproduction of
19 evidence may give rise to the inference it would
20 have been adverse to the party who could have
21 produced it.

22 We believe that the prosecutor's
23 questions on cross-examination and its remarks in
24 closing arguments were simply comments designed to
25 draw reasonable inference based on Keen's -- that

1 was the defendant -- Keen's failure to present
2 evidence relating to the breath sample.

3 Although we do not have a complete trial
4 transcript, it is apparent from defense counsel's
5 closing statements that Keen had challenged the
6 validity of the state's blood-alcohol test results.

7 It strikes us as elemental fairness to
8 allow the state to comment upon the defense's
9 failure to adduce potentially exculpatory evidence
10 to which defendant had access when defendant is
11 attacking the accuracy of the state's evidence.

12 This goes far beyond what the state has
13 done here, Your Honor. We have not talked about
14 the defendant's failure to test anything. I am
15 highlighting what this witness knew and when he
16 knew it. It determines the course of the
17 investigation. And when he does finally learn
18 about organophosphate poisoning, what he does with
19 that information.

20 I'm also highlighting the fact that
21 medical examiners throughout the course of the
22 investigation, and when they did their autopsies
23 and reached their conclusions, again, no
24 information about organophosphates had been given
25 to them.

1 Even when the defense attorneys
2 interviewed those medical examiners, not once but
3 twice, never mentioned to them organophosphate
4 poisoning. And yet in this trial says to each of
5 the medical examiners, highlights that nobody ever
6 told them about organophosphate poisoning and
7 highlights the fact -- suggests to the jury that it
8 would have about made a difference in the outcome.

9 MR. LI: May I respond, Your Honor?

10 THE COURT: Yes, Mr. Li.

11 MR. LI: First of all, the evidence that was
12 played yesterday is state's evidence. This was a
13 recording made by the state on October 8, 2009. We
14 didn't make the statement. We found it in the
15 discovery that apparently the state never listened
16 to. So that's No. 1.

17 So the state has a detective who is
18 actually recording this conversation, and there
19 were a number of detectives who were in there.
20 There was somebody who came in there and said that.

21 So to the extent that Ms. Polk is
22 suggesting we're hiding the ball, I think that's
23 inaccurate. I think had the detectives wanted to
24 figure out who that person is, who's speaking, the
25 detectives could have done that.

1 They have logs of who comes onto the
2 scene, all of those sorts of things. They could
3 have done an investigation into who this person is.
4 But they didn't. And the facts are, and
5 Detective Diskin, I believe, will say this on the
6 stand, the first time he ever heard this tape was
7 when I gave my opening statement.

8 So it's not our burden to inform the
9 state of what evidence it has collected. And the
10 problem with Ms. Polk's argument is that it is
11 burden shifting. It does make the suggestion that
12 somehow the defense has some obligation to explain
13 to the state the deficiencies in their
14 investigation, that we have some obligation to lay
15 out for the state, hey, you know what. You guys
16 failed to look at organophosphates and then tell
17 the state how to fix it.

18 That's the state's obligation because
19 they're the people who are supposed to prove beyond
20 a reasonable doubt the guilt or -- of any person.
21 And it's their duty to do an investigation that's
22 proper in which they're looking at all directions.

23 To this day, they have not tried to
24 figure out who that person is. But instead
25 Ms. Polk gets up there and suggests that it's an

1 unknown male and somehow that's our responsibility.
2 That is burden shifting, Your Honor. It
3 is unconstitutional. It is one of the reasons why
4 we're pushing so hard for a jury instruction that
5 lays out to this jury what the burdens actually
6 are.

7 I don't think the state should be afraid
8 of the burden. When I was a prosecutor, I embraced
9 it, and they should too. It's not appropriate to
10 sit here and make all these suggestions and then
11 run away from the burden of proof and not instruct
12 the jury, hey, you know what, actually this is the
13 burden of proof.

14 A couple of points that really need to be
15 made clear. This tape is made on October 8, 2009,
16 the night of the incident at some time in the
17 evening. Organophosphates, as it turns out, in
18 blood does not last for more than 36 hours to three
19 days. Something -- and I'm not an expert on that.
20 But it's a very short time period.

21 So the suggestion that the defense could
22 have somehow gotten the blood samples from the
23 decedents, tested it, even before the defendant was
24 even indicted -- remember, the defendant, Mr. Ray,
25 is indicted months after the fact. By that time

1 all the blood samples have been -- any chance of
2 finding organophosphates is long gone. We don't
3 even have the tape at that point.

4 The Court may recall that actually the
5 state disclosed all of the discovery to the press
6 before they disclosed it to us.

7 And I want to make one point. We
8 found -- Ms. Do found this statement in these
9 interviews by literally listening to hours and
10 hours and hours of testimony. Frankly, something
11 that the detectives should have done.

12 And it's only after hearing this thing,
13 my goodness, there is actually a moment in this
14 tape where somebody mentions organophosphates, that
15 we realized that this might actually be -- you
16 know -- that this was actually said that night.

17 One more point. With respect --
18 Ms. Seifter, who is not here right now, sent us a
19 text saying that the case that Ms. Polk is citing,
20 in that particular case, right after the part she
21 quotes, a cautionary instruction regarding the
22 burden of proof was given.

23 That's the point here, that when the
24 state repeatedly just makes this kind of suggestion
25 that the defense is somehow hiding something or

1 that we're doing something improper, that turns the
2 constitution on its head.

3 The state has the obligation. This is
4 not a civil case. They're trying to put Mr. Ray in
5 jail. They have obligations. And they have to
6 prove it beyond a reasonable doubt.

7 The fact that this jury has not been
8 instructed on that while Ms. Polk continually goes
9 down this road getting right up to the edge of
10 what's permissible -- and we would submit past the
11 edge -- but right up to that edge of what is
12 permissible in terms of questioning -- obviously,
13 Your Honor, we have objected so we're just stating
14 that for the record.

15 But the fact that we get right up against
16 the edge and with not consent to an instruction to
17 this jury about what the burden of proof is seems
18 to me inappropriate. This jury should be
19 instructed as to the burden. And I'd submit on
20 that, Your Honor.

21 THE COURT: The original instruction you had
22 with regard to causation, I think you wanted to
23 incorporate intervening cause?

24 MR. LI: Yes, Your Honor.

25 THE COURT: Any number of things which is kind

1 of the theory of a case kind of thing.

2 Ms. Polk, you were aware in the case
3 you're citing to me the Court provided cautionary
4 instruction contemporaneously?

5 MR. LI: I don't have it in front of me.
6 She's just been reading it.

7 THE COURT: I would certainly see the logic.

8 MS. POLK: Your Honor, what I'm reading from,
9 it says: The prosecutor's questions on
10 cross-examination and its remarks in closing
11 arguments.

12 And they're referring to the prosecutor
13 statement in rebuttal closing, which, of course,
14 would be after the jury had been instructed.

15 Your Honor, I just want to respond to a
16 couple things. The suggestion that this is going
17 right up to the edge is just not supported by the
18 law. And, again, in Mr. Li's comments, this is not
19 the state attacking the defense for their strategy.
20 They have a reason for their strategy, and they're
21 entitled to a strategy.

22 This is not about the defense strategy.
23 This is about this witness explaining the course of
24 his investigation and why he did what he did. It's
25 the defense that has made this issue of

1 organophosphates front and center. And this
2 witness is explaining how it is that he goes
3 through 18 months without even hearing the word
4 "organophosphates."

5 He will explain when he finally does what
6 are the actions that he takes. That is appropriate
7 for this witness to be explaining to the jury his
8 investigation, especially when his investigation is
9 under attack, as is clear from what Mr. Li just
10 said.

11 He just described about how, in his
12 opinion, that this comment, which is background --
13 it's not part of the interview. It's background --
14 how this detective should have found it and should
15 have done certain things. They can make those
16 arguments. That's legitimate.

17 But it's appropriate, entirely
18 appropriate, for this witness to explain 18 months
19 and when it is that he first hears about
20 organophosphates and then what are the actions that
21 he takes.

22 THE COURT: Ms. Polk, what about the
23 implication that the defense somehow has to tell
24 the state what might be important, that
25 implication? That's the burden shifting. And I

1 haven't heard you really address that.

2 MS. POLK: Your Honor, I think these two cases
3 that I cited to the Court deal with conduct that
4 goes much further than what this conduct is about.
5 These are two cases where the prosecution was
6 allowed to comment on the defendant's failure to
7 test items.

8 What I'm asking this witness is simply
9 when it is that he hears any reference to
10 organophosphates. And then when he does, what is
11 it that he does.

12 THE COURT: You didn't just ask him that. You
13 asked him when he didn't hear it, when there
14 happened to be defense attorneys talking to him in
15 an interview. So you didn't just simply ask him
16 that one question.

17 MS. POLK: I'm establishing all the
18 opportunities that the defense team -- all the
19 times he talks to them and all the times that he is
20 not asked about organophosphates, and then suddenly
21 here in this trial, on the stand, he is being
22 questioned and attacked for not investigating
23 organophosphates.

24 THE COURT: Mr. Li.

25 MR. LI: Your Honor, I would submit it's his

1 job to investigate all of these things. And the
2 other thing I would say is we didn't make the issue
3 of organophosphates front and center. Whoever that
4 person, who I will submit is the EMT personnel.
5 Because he says, among other things, call 9-1-1 and
6 we'll be back. That person made organophosphates
7 front and center on October 8, 2009.

8 The other point I'd make, Your Honor, is
9 to this day, I don't think anybody can say they
10 know what caused these folks to die. That's the
11 problem. You will have these medical examiners.
12 And they can't say beyond a reasonable doubt what
13 it is that caused these folks to die.

14 It's not the defense's burden to prove
15 that they were, in fact, killed by
16 organophosphates. What we can suggest, and I
17 believe we have suggested, and I believe the
18 medical examiners and the treating physicians have
19 agreed, that they can't -- these symptoms are very
20 similar and they can't rule it out.

21 The problem is the state, notwithstanding
22 the fact that they had a room full of detectives
23 and heard an EMT personnel come in there and say,
24 we think there may have been organophosphates in --
25 they didn't test. And then the blood degrades.

1 And whatever organophosphates -- if there had been
2 organophosphates in there, they're gone now.

3 And so the problem is we don't -- the
4 state keeps on suggesting that we are trying to
5 prove that organophosphates killed these folks. We
6 think it's possible -- you know -- and we agree
7 with the medical examiners, obviously, that you
8 can't rule it out. But we don't have a burden.
9 And that's the point that I keep --

10 THE COURT: There is another implication,
11 Mr. Li, that concerns me. It's the implication now
12 that the defense somehow has to explain when they
13 might have thought it of it or something like that.
14 It raises that as well. And that's a concern. So
15 I'm not trying to cut you off on this. I have some
16 concerns. And I want to look at the law.

17 So, Ms. Polk, in terms of questioning
18 about when he first heard about that, and when he
19 heard about it internally or from people that were
20 involved in the investigation, that's one thing.

21 But this is of concern when making some
22 implication that the defense and when they might
23 have known something and what they should do in an
24 interview and that. I don't see it exactly like,
25 well, this isn't as much as what happened in the

1 McDougall case. I don't know if it can be
2 characterized in that fashion.

3 MS. POLK: Your Honor, Mr. Li just said the
4 problem in this case is that this witness did not
5 find that reference to organophosphates and did not
6 test. This witness is explaining how it is that he
7 did not find and then what he did when he finally
8 found it.

9 The problem -- the problem in this case
10 is that hearsay has now been presented to the jury
11 about the possibility of organophosphate poisoning
12 without any opportunities for the state to
13 cross-examine the person who made that statement.

14 And the defense has built a case
15 suggesting that this detective's investigation was
16 inadequate because he failed to find that reference
17 in the background and didn't test. This witness
18 and the state can explain how that happened.

19 And that's what we're doing right now.
20 We're explaining the course of his investigation,
21 when it was that he learned about organophosphates.
22 How is it that he goes 18 months and never hears
23 about organophosphates? How is it? What is the
24 jury thinking that this detective, when this
25 case -- so much of this case through the defense

1 has been about organophosphates, how is it that
2 this witness wouldn't even have heard about it in
3 18 months. And the witness didn't. And he's
4 explaining how it is that he did not.

5 MR. LI: Your Honor, it's a room full of
6 detectives who are interviewing witnesses on the
7 night of the accident. And it happens to get
8 picked up by a tape-recording. So this idea that
9 it's somehow buried almost as if it were some
10 secret transmission is just simply not the case.
11 There are people there and people responding to the
12 EMT personnel saying, what symptoms do we look for?

13 So it's not a big secrete. In fact,
14 there are detectives who are recording this exact
15 conversation. It's not the defense evidence. It's
16 the state's evidence.

17 MS. POLK: And the defense can cross-examine
18 on those points that they're raising. But this
19 detective and his opportunity to explain why he did
20 what he did in the investigation and how it is that
21 he goes 18 months without even hearing the word;
22 when he finally hears it a month before trial,
23 actually two weeks before trial, and then what he
24 does at that time is appropriate.

25 THE COURT: And then but implying that the

1 defense somehow needs to have input into this.
 2 That's what I still haven't heard addressed. Other
 3 than in some fashion to suggest that his
 4 investigation can't be so bad if other people,
 5 everybody, whoever it might be, wasn't telling him
 6 something. I have a concern about that.

7 So at this point, in terms of explaining
 8 the investigation, that's fine. But in terms of
 9 implicating or implying that the defense has some
 10 obligation, questions that do that, I will look at
 11 the law before I say anything further on that.

12 I would also like to see law on the idea
 13 of contemporaneous instruction. I know it's
 14 provided for in 105 limiting instructions. It's
 15 there. But to in the middle of the trial make
 16 various instructions, it's not something that you
 17 see often. There has been Brady issue here. It's
 18 an unusual posture anyway.

19 We're well past 90 minutes. We need to
 20 take a break and resume at 3:00.

21 (Recess.)

22 (Proceedings continued in the presence of
 23 jury.)

24 THE COURT: The record will show the presence
 25 of Mr. Ray, the attorneys, the jury. And

1 Detective Diskin is on the witness stand.

2 Ms. Polk.

3 Q. BY MS. POLK: Detective, will you tell
 4 the jury when it was that you first heard any
 5 reference to the word "organophosphates."

6 A. Yes. It was during the state's interview
 7 of Dr. Paul, who was listed as a defense expert.

8 Q. And who conducted that interview of
 9 Dr. Paul?

10 A. Bill Hughes.

11 Q. Did you see the report prepared by
 12 Dr. Paul?

13 A. I did.

14 Q. And were organophosphates referenced or
 15 mentioned in any way in that report?

16 A. No.

17 Q. Do you recall the date of the interview
 18 by Mr. Hughes of Dr. Paul?

19 A. I believe it was January 31, 2011.

20 Q. And you were present?

21 A. Yes. It was over the phone.

22 Q. In response to a question asked by
 23 Mr. Hughes of Dr. Paul, did you hear the word
 24 "organophosphates"?

25 A. Yes.

1 Q. Was that the first time in this
 2 investigation that you had ever heard that word?

3 A. That's the first time in my life I've
 4 ever heard the words "organophosphates."

5 Q. After learning about a reference by the
 6 defense witness, Dr. Paul, to organophosphates,
 7 what did you do?

8 A. After that meeting, I contacted the
 9 medical examiners and asked them to test samples
 10 from the victims for organophosphates.

11 Q. And, specifically, what samples were
 12 still maintained or retained by the medical
 13 examiners with respect to the three victims in this
 14 case?

15 A. I believe they were blood samples.

16 Q. And what medical examiners did you
 17 contact?

18 A. I contacted Dr. Mosley directly. And
 19 then I contacted Cindy Ross with the Yavapai County
 20 Medical Examiner's Office.

21 Q. Which autopsy did Dr. Mosley perform?

22 A. He did the autopsy on Liz Neuman.

23 Q. And what office is Dr. Mosley with?

24 A. The Coconino County Medical Examiner's
 25 Office.

1 Q. And then you contacted a representative
 2 for the Yavapai County Medical Examiner's Office?

3 A. Yes.

4 Q. And with respect to which two victims?

5 A. With respect to James Shore and Kirby
 6 Brown.

7 Q. Did you make a specific request of the
 8 medical examiners at that point?

9 A. Yes.

10 Q. And what was the request?

11 A. To test for organophosphate poisoning.

12 Q. Do you know whether the Yavapai County
 13 medical examiner, Dr. Lyon, sent the samples to a
 14 lab to be tested?

15 A. Yes.

16 Q. And do you know whether the blood samples
 17 for Kirby Brown and James Shore were tested for
 18 organophosphates?

19 A. Yes.

20 Q. And do you know the result?

21 A. Yes.

22 Q. And can you tell the jury the results?

23 A. Yes. They were negative.

24 Q. Did you subsequently learn whether those
 25 results or that testing all those months after,

1 whether those were reliable results?

2 **A. We learned that they may not be reliable**
3 **because of the time frame that had passed.**

4 **Q.** Did you learn whether the Coconino County
5 Medical Examiner's Office sent any samples from Liz
6 Neuman to be tested for the presence of
7 organophosphates?

8 **A. Eventually, yes.**

9 **Q.** Was it tested?

10 **A. Yes.**

11 **Q.** Do you know the results?

12 **A. Yes.**

13 **Q.** What are the results?

14 **A. The results were negative.**

15 **Q.** Also not necessarily reliable?

16 **A. Right. In that case it's even less**
17 **reliable because Liz Neuman was alive for several**
18 **days after the sweat lodge incident before she**
19 **passed away. The autopsy was even after that. It**
20 **had been several days since the sweat lodge**
21 **incident before her blood was drawn for this**
22 **testing.**

23 **Q.** Because the blood sample is taken at the
24 time -- because a blood sample is taken when?

25 **A. At the time of the autopsy.**

1 **Q.** Based on the totality of your
2 investigation and all of the interviews that you
3 conducted or other detectives with your office
4 conducted, did you ever find any evidence of the
5 presence of organophosphates at the scene?

6 **A. No.**

7 **Q.** Did you ever find any evidence -- did you
8 ever find anything that would appear to you to
9 create a credible risk of death to the three
10 victims due to organophosphates?

11 **MR. KELLY:** Your Honor, objection. Lack of
12 foundation.

13 **THE COURT:** Sustained.

14 **Q.** BY MS. POLK: Did you ever find any
15 evidence of the use of any product at Angel Valley
16 that contained organophosphates?

17 **MR. KELLY:** Your Honor, objection. He doesn't
18 know what it is.

19 **THE COURT:** Sustained as to foundation.

20 **Q.** BY MS. POLK: After learning of
21 organophosphates, did you engage in further
22 investigation to learn whether or not
23 organophosphates products were present at
24 Angel Valley?

25 **A. Yes.**

1 **Q.** And what did you find?

2 **A. I found that no products containing**
3 **organophosphates had ever been used at**
4 **Angel Valley.**

5 **MR. KELLY:** Your Honor, objection.

6 **THE COURT:** Sustained. The answer is
7 stricken.

8 **Q.** BY MS. POLK: After conducting your
9 investigation, did you, based on the results of the
10 investigation, form some conclusions as to whether
11 organophosphates had ever been used at
12 Angel Valley? Yes or no?

13 **A. Yes.**

14 **MR. KELLY:** Your Honor, objection. Ask it be
15 stricken. Lack of foundation.

16 **THE COURT:** There was no answer. But the
17 objection is sustained.

18 **Q.** BY MS. POLK: Did you also learn at some
19 point -- did you also hear the suggestion at some
20 point that use of rat poison might have some
21 connection to the death of the three victims?

22 **A. Yes.**

23 **Q.** When was it that you first learned that
24 information?

25 **A. During this trial.**

1 **Q.** And after learning that information, did
2 you take further investigative steps?

3 **A. No.**

4 **Q.** Did you conduct any further inquiry into
5 whether or not rat poison played some role in the
6 deaths of the three victims?

7 **A. No.**

8 **MR. KELLY:** Your Honor, object to the form of
9 the question, the final question.

10 **THE COURT:** Indicated he made no further
11 inquiry.

12 You may continue.

13 **Q.** BY MS. POLK: Did you contact the
14 Hamiltons after the trial started?

15 **A. Yes.**

16 **Q.** And for what purpose?

17 **A. The purpose for me contacting the**
18 **Hamiltons was to ask about the wood and if the wood**
19 **had ever been treated with any chemicals.**

20 **Q.** And when was that? Do you recall when
21 you contacted the Hamiltons about the wood?

22 **A. It was in March after the trial started.**
23 **I don't remember the date.**

24 **Q.** And where were you when you had contact
25 with the Hamiltons?

1 **A. I called them from my cell phone.**
 2 **Q.** Did you have a subsequent meeting with
 3 them?
 4 **A. I did.**
 5 **Q.** Where did that meeting occur?
 6 **A. That occurred in our office at the**
 7 **Yavapai County Sheriff's Office.**
 8 **Q.** Did the Hamiltons to your office?
 9 **A. Yes.**
 10 **Q.** Were they with an attorney?
 11 **A. No.**
 12 **Q.** What did you ask the Hamiltons at that
 13 point?
 14 **A. I talked to them over the phone about the**
 15 **wood. I wanted to know if there was any**
 16 **documentation they had about the condition of the**
 17 **wood when they purchased it, whether it was treated**
 18 **or not. And Michael Hamilton told me that he**
 19 **wanted to meet in person.**
 20 **So I believed that the purpose of the**
 21 **meeting was for him to give me documentation that**
 22 **the wood had not been treated. During that meeting**
 23 **I can't remember who started the conversation. But**
 24 **we talked about the rat poison and the location of**
 25 **the rat poison and whether or not they'd used rat**

1 **poison.**
 2 **Q.** And did you ask the Hamiltons to do some
 3 follow-up for you based on that conversation on rat
 4 poison?
 5 **A. Yes.**
 6 **Q.** What did you ask them to do?
 7 **A. I had not seen the inside of the pump**
 8 **house where the tarps were stored. And I did not**
 9 **know where they had put the rat poison in**
 10 **relationship to the tarps and blankets. I asked**
 11 **them to take the picture where the rat poison would**
 12 **have been and in relation to where the tarps and**
 13 **blankets were and email it to me so I can get an**
 14 **idea where the rat poison was located in relation**
 15 **to the tarps and blankets.**
 16 **Q.** What had you learned at that point that
 17 made you even ask them about the presence of rat
 18 poison in the pump house?
 19 **A. There was a suggestion during trial that**
 20 **somehow the participants must have somehow ingested**
 21 **the rat poison and that might be why they died.**
 22 **MR. KELLY:** Your Honor, objection, based on
 23 our earlier discussion.
 24 **THE COURT:** Ms. Polk, legal response.
 25 **MS. POLK:** Your Honor, this explains the

1 actions of the detective and the Hamiltons.
 2 **THE COURT:** Okay.
 3 **MR. KELLY:** Judge --
 4 **MS. POLK:** Your Honor, I can move on.
 5 **THE COURT:** Please.
 6 **Q.** BY MS. POLK: I'll just move on to the
 7 next question.
 8 After your meeting with the Hamiltons,
 9 had you requested that photographs be taken?
 10 **A. Yes.**
 11 **Q.** And did you direct the Hamiltons
 12 specifically what photographs to take?
 13 **A. Yes.**
 14 **Q.** What did you direct the Hamiltons to do?
 15 **A. I asked them to take pictures of the pump**
 16 **house with showing me where the rat poison would**
 17 **have been.**
 18 **Q.** And when you say "would have been," did
 19 you direct the Hamiltons to a specific period of
 20 time?
 21 **A. Yes. In 2009.**
 22 **Q.** You gave them the entire year 2009?
 23 **MR. KELLY:** Your Honor, objection. Leading
 24 question.
 25 **THE COURT:** Overruled.

1 You may answer that if you can.
 2 **THE WITNESS:** I don't remember if I said
 3 October 8, 2009, or just 2009 in general.
 4 **Q.** BY MS. POLK: The word "staged" has been
 5 used for those photographs here in this courtroom.
 6 Did you ask the Hamiltons to stage some photographs
 7 for you?
 8 **A. I wouldn't use the word "stage." I just**
 9 **wanted to see for myself where the rat poison was**
 10 **in relationship to the photo. I asked them to put**
 11 **the rat poison or put -- indicate somehow where the**
 12 **rat poison would have been and take photos of it so**
 13 **I could see where it was.**
 14 **Q.** And did you know whether rat poison had
 15 been in the pump house on October 8 of 2009?
 16 **A. I believe there had been rat poison in**
 17 **the pump house.**
 18 **Q.** What was that based on?
 19 **A. When I interviewed Ted Mercer on**
 20 **October 9, he mentioned there was what he believed**
 21 **to be rat poison inside the pump house.**
 22 **Q.** Did you find any evidence of the use of
 23 poisons in the area of the sweat lodge during your
 24 investigation?
 25 **A. No.**

1 Q. And, Detective, are you aware that many
2 household and yard products contain many chemicals?

3 A. Yes.

4 Q. You handle household and yard products
5 that contain chemicals yourself?

6 A. Yes.

7 Q. Did you find any evidence in this case at
8 the crime scene to suggest that products used to
9 kill ants had some effect on the three victims in
10 this case?

11 A. No.

12 Q. Let's talk about the investigation into
13 the deaths of Kirby Brown and James Shore and Liz
14 Neuman. And, specifically, I want to ask you about
15 the autopsies. Will you explain to the jury how
16 your office and you work with the medical
17 examiner's office.

18 A. **Usually when we have any kind of
19 suspicious death or we don't know why the person
20 died, one of the detectives will attend the autopsy
21 with the medical examiners, and they share
22 information back and forth.**

23 Q. And did that happen in this case?

24 A. Yes.

25 Q. Were you the detective that attended the

1 autopsies?

2 A. No.

3 Q. Did somebody else from the Yavapai County
4 Sheriff's Office attend the autopsies?

5 A. Yes.

6 Q. On -- I'm going to go back to October 9,
7 2009, out at Angel Valley. You told the jury about
8 the search warrant you got for Angel Valley. Did
9 that warrant include the authorization to search
10 the room that Mr. Ray had been staying in?

11 A. Yes.

12 MS. POLK: Your Honor, counsel has agreed to
13 the admission of Exhibits 931, 930, 932, 312 and
14 313.

15 THE COURT: 931, 930, 932, 312 and 313 are
16 admitted.

17 (Exhibits 312, 313 and 930-932 admitted.)

18 Q. BY MS. POLK: I'm going to put up on the
19 overhead, Detective, Exhibit 930, and ask you to
20 tell the jury what this is.

21 A. **This is -- there is two rooms that are
22 next to the dining hall at Angel Valley. And this
23 room here was the room where James Ray was staying.**

24 Q. Is that the door to get in and out of
25 that room?

1 A. Yes.

2 Q. I'm going to put up on the overhead
3 Exhibit 931. What is this?

4 A. **This would be the back window of that
5 room.**

6 Q. I'm going to put up on the overhead
7 Exhibit 932. If you will tell the jury what this
8 is.

9 A. **That would be James Ray's wallet.**

10 Q. Where did you find that wallet?

11 A. **That was inside the room.**

12 Q. What time approximately was it that you
13 conducted the search of Mr. Ray's room?

14 A. **I think it was early afternoon, maybe
15 around lunchtime, by the time we finally got the
16 search warrant.**

17 Q. And had that room at some point been
18 cordoned off, isolated, so that people could not
19 enter or leave? Had that at some point been done
20 by members of the Yavapai County Sheriff's Office?

21 A. Yes.

22 Q. When was that?

23 A. **The night before, shortly after
24 detectives arrived.**

25 Q. And from the moment that the room was

1 isolated, was Mr. Ray allowed to enter it?

2 A. No.

3 Q. What is this wallet with
4 identification -- what does that -- what role does
5 that play in your investigation?

6 A. **That just indicates -- that is what's
7 called "indicia of occupancy," meaning that it's
8 evidence that a particular person occupies a
9 particular room. Mr. Ray didn't leave his wallet
10 behind. We had seized the room so Mr. Ray could
11 not go into the room to get his wallet.**

12 Q. And you use the term "indicia of
13 occupancy." Is that a factor that you uniformly
14 look for when conducting a search of a room where a
15 person has resided?

16 A. Yes.

17 Q. I'm going to put up on the overhead
18 Exhibit 312. Tell the jury what that is.

19 A. **That's a briefcase that has a laptop
20 computer and a file.**

21 Q. Did you seize this briefcase?

22 A. We did.

23 Q. With the contents inside?

24 A. Yes.

25 Q. I'm going to put up on the overhead

1 Exhibit 313. And tell the jury what this is.

2 **A. That's the label on the file folder**
3 **that's in the briefcase. It says, Spiritual**
4 **Warrior, October 3rd through the 8th, 2009.**

5 MS. POLK: Your Honor, may we approach for a
6 moment?

7 THE COURT: Yes.

8 (Sidebar conference.)

9 MS. POLK: Your Honor, I wanted to check. In
10 light of the Court's rulings, I had intended at
11 this point to establish that no script pertaining
12 to the briefing prior to entering the sweat lodge
13 was found in the room.

14 MR. KELLY: I'm not sure. I have to hear that
15 again. Do you intend to establish that something
16 doesn't exist because it wasn't found in the room
17 or there is no evidence that there ever was
18 anything existing?

19 MS. POLK: Well, as Court and counsel know,
20 there were evidence of quite a few documents in
21 that folder. There were a lot of scripts. And
22 what is not in the room is the script for the
23 briefing. And as I told the Court earlier, the
24 search at Carlsbad reveals no script either. And
25 it's not until we get the audio that the detective

1 learns the exact words by Mr. Ray.

2 MR. KELLY: And just to clarify, the script
3 for the briefing -- are we talking about the
4 presweat lodge presentation that's in evidence?

5 MS. POLK: Yes. The 45-minute briefing that
6 Mr. Ray gave participants before they entered the
7 sweat lodge.

8 MR. KELLY: How would we know there ever was a
9 script?

10 MS. POLK: That would be the subject of
11 cross-examination.

12 MR. KELLY: Judge, this is highly improper.
13 The evidence, what actually is said -- excuse me.
14 The words, what has actually been said, is in
15 evidence in this case. There is no evidence, pure
16 speculation. My objection would be speculation.

17 THE COURT: And also it creates the kind of
18 situation, almost forces a defendant to testify or
19 something about what's in the briefcase.

20 But you mentioned before, Ms. Polk, that
21 there are other scripts that correlate to what's on
22 the tapes.

23 MS. POLK: Yes. And those are the documents
24 that the Court had this morning when we made this
25 argument.

1 THE COURT: You mean "The Dream," for example?

2 MS. POLK: Yes. And there were other scripts
3 that I didn't argue to the Court in light of the
4 earlier ruling.

5 THE COURT: I really didn't see any scripts in
6 any of the documents I looked at.

7 MS. POLK: There was "The Dream," and there
8 was the script for the five powers.

9 THE COURT: The seven stages?

10 MS. POLK: Yes.

11 THE COURT: There is -- that I read through
12 all of it. There is an outline for the Samurai
13 Game. And, again, what it means, whether that's
14 how it was actually conveyed to the participants.
15 There is no knowledge of there being a script.
16 There is implying there must have been a script as
17 opposed to just speaking, to say what's not there.
18 I -- no. That's not admissible.

19 MS. POLK: Your Honor, at Carlsbad when they
20 go in, there is a lot of paper documents pertaining
21 to other events. There is very little with respect
22 to Spiritual Warrior 2009.

23 MR. KELLY: Judge, again, the relevance. I
24 don't understand what the relevance would be.

25 THE COURT: The implication is that evidence

1 has been destroyed. That's the implication.

2 MR. KELLY: It's speculation and highly
3 prejudicial.

4 MS. POLK: It goes to the weight. Your Honor,
5 it is prejudicial. That's why the state wants to
6 offer it. We know that this is a scripted event.
7 We know what we find in the briefcase in the room.
8 We know what is not there at Carlsbad several days
9 later when the search is done there.

10 The information is relevant. It is
11 prejudicial. And that's why the state wants it in.
12 It's not unduly. These are the documents found in
13 this man's possession. These are the documents
14 found at Carlsbad. And we can argue reasonable
15 inference from the evidence. Mr. Kelly can
16 cross-examine if he believes that it's speculative.
17 He can cross-examine. This is the evidence found
18 at the scene. The Court has precluded documents,
19 essentially, found in defendant's possession. But,
20 again, these are reasonable inferences what is not
21 there.

22 MR. KELLY: Judge, objection regarding
23 speculation is based on lack of foundation. This
24 witness has no idea whether these presentations
25 were scripted or not. Be pure speculation to

1 assume that.

2 So contrary to what Ms. Polk says, we
3 don't know that. There has been no evidence. And
4 I think the evidence has been quite to the contrary
5 that much of the presentation is kind of from the
6 hip by Mr. Ray. He does it every day. It's his
7 job.

8 And to imply that to take my
9 cross-examination script and say I didn't ask some
10 particular aspect of it or that I took it home and
11 threw it away is some type of consciousness of
12 guilt. Destruction of evidence is a stretch.

13 THE COURT: Ms. Polk, how many hours of -- I
14 ordered that the tape had to be produced by
15 Mr. Barber? How many hours are recorded on that?

16 MS. POLK: It's many hours, Your Honor. It
17 covers from Sunday through Tuesday evening. And
18 then it picks up again on Thursday morning when
19 they come back from the Vision Quest.

20 MR. KELLY: Judge, I listened to most of it.
21 And it is not complete. It is not a 24-hour-a-day
22 recording of each and every event throughout the
23 seminar.

24 MS. POLK: And that's correct. The testimony
25 in this trial has already been of Ms. Melinda

1 Martin, there were areas where they didn't take the
2 recording equipment, for example, inside the sweat
3 lodge, when the Samurai Game was being played.
4 Those are not being recorded.

5 THE COURT: So with all these hours of
6 instructions and lectures that are going to be
7 played, the fact that there isn't corroborating
8 Spiritual Warrior stuff in writing, it shows
9 something?

10 MS. POLK: I think what's relevant is what are
11 the documents he has and what we find in Carlsbad.
12 And then we argue reasonable inferences. If the
13 defense wants to argue that it's not reasonable to
14 think there should be a script, it's not reasonable
15 to believe that there should be more documents at
16 Carlsbad than what he found. He can argue that.

17 THE COURT: In Carlsbad, you're saying all
18 these other -- Harmonic Wealth, Practical
19 Mysticism, there's just all these laid out scripts?
20 Is that what you're saying.

21 MS. POLK: No. In Carlsbad I'm not talking
22 about scripts. In Carlsbad I'm talking about
23 information. There is a lot of information about
24 other seminars. There is very little about
25 Spiritual Warrior 2009. Not scripts, just general

1 information.

2 THE COURT: The number of issues that get
3 thrown here, at this point just speculating there
4 should be something, you don't see it, and then
5 making an implication there, at this point I just
6 don't see the supporting information for that. So
7 no.

8 (End of sidebar conference.)

9 Q. BY MS. POLK: Detective, on
10 October 14, 2009, did you -- was there another
11 search warrant that was executed in California?

12 A. Yes.

13 Q. And what area or property was that
14 directed to?

15 A. That was James Ray International in
16 Carlsbad, California.

17 Q. Detective, were some photographs taken at
18 that time?

19 A. Yes.

20 Q. I'm going to put up on the overhead
21 Exhibit 566. Did you participate in this search
22 warrant?

23 A. I did.

24 Q. And tell the jury what that is.

25 A. That is the building where James Ray

1 International was located.

2 Q. And where is it?

3 A. It's in Carlsbad, California.

4 Q. And I'm going to put up on the overhead
5 Exhibit 568. Will you tell the jury what this is.

6 A. That's the front reception area at James
7 Ray International.

8 Q. And I'm going to put up on the overhead
9 Exhibit 569. Can you tell the jury what this is.

10 A. This shows the different cubicles where
11 the employees at James Ray International worked.

12 Q. I'm going to put up Exhibit 567. Can you
13 tell the jury what that is.

14 A. I believe that's the sign outside the
15 door to the business.

16 Q. I'm going to put up on the overhead
17 Exhibit 570. Can you tell the jury what this is.

18 A. That is James Ray's office.

19 Q. I'll put up on the overhead Exhibit 571.
20 Tell the jury what that is.

21 A. That's also James Ray's office.

22 Q. Detective, in this investigation did you
23 conduct interviews of many people?

24 A. Yes.

25 Q. Approximately how many people did you

1 interview?

2 **A. Approximately about 75.**

3 **Q.** And did other detectives from your office
4 also interview witnesses or people?

5 **A. Yes.**

6 **Q.** When was it that you interviewed the
7 Hamiltons?

8 **A. I talked to them briefly on October 9 in**
9 **the evening just trying to set up another time to**
10 **talk to them. And then I believe it was a couple**
11 **weeks later.**

12 **Q.** Why did you not interview the Hamiltons
13 sooner?

14 **A. Well, we'd already been there for several**
15 **hours on the 9th. They had not witnessed the**
16 **actual sweat lodge incident. And so I -- they were**
17 **willing to talk to me that night, and I requested**
18 **that I come back later and interview them. When I**
19 **called them to set up that interview, they said**
20 **they had been contacted by their insurance company,**
21 **and they wanted to set up the interview with their**
22 **attorney.**

23 **Q.** Did that happen?

24 **A. Yes.**

25 **Q.** And did you then conduct that interview?

238

1 **A. I did.**

2 **Q.** And you tape-recorded it?

3 **A. I did.**

4 **Q.** Have the Hamiltons always cooperated with
5 you?

6 **A. Yes.**

7 **Q.** Did you participate, Detective, in a
8 meeting that occurred on December 14, 2009?

9 **A. I did.**

10 **Q.** And where was that meeting held?

11 **A. That was in the law library at the**
12 **Yavapai County Attorney's Office.**

13 **Q.** Approximately how many people were
14 present at that meeting?

15 **A. Probably 15 or 20.**

16 **Q.** And this was how many weeks after the
17 death of three people in Mr. Ray's sweat lodge?

18 **A. This was about two months.**

19 **Q.** Were representatives from your office
20 there in addition to yourself?

21 **A. Yes.**

22 **Q.** Tell the jury what other offices had
23 representatives present.

24 **A. There were representatives from the**
25 **Coconino County Medical Examiner's Office, the**

1 **Yavapai County Medical Examiner's Office, and the**
2 **Yavapai County Attorney's Office and the Yavapai**
3 **County Sheriff's Office.**

4 **Q.** Was I present at that meeting?

5 **A. You were.**

6 **Q.** Along with Mr. Hughes?

7 **A. Yes.**

8 **Q.** Were there other deputy county attorneys
9 present?

10 **A. Yes.**

11 **Q.** Did you do a presentation at that
12 meeting?

13 **A. I did.**

14 **Q.** In what form?

15 **A. I did a PowerPoint presentation.**

16 **Q.** Do you recall how long your presentation
17 lasted for?

18 **A. It was about two hours.**

19 **Q.** From your perspective, Detective, what
20 was the purpose of that meeting?

21 **A. To present the case to the county**
22 **attorney's office and the medical examiners as far**
23 **as the information we had uncovered so far with**
24 **this investigation.**

25 **Q.** Do you know whether or not it is the

240

1 practice for detectives to present cases to the
2 county attorney or deputy county attorneys?

3 **A. Yes. That's pretty normal.**

4 **Q.** And have PowerPoint presentations been
5 used in other cases to present a case?

6 **A. Yes.**

7 **Q.** Who prepared that PowerPoint
8 presentation?

9 **A. I did.**

10 **Q.** Did you have assistance?

11 **A. I did.**

12 **Q.** From whom?

13 **A. From the other detectives involved and**
14 **also my sergeant at the time.**

15 **Q.** Had you ever participated in -- do you
16 have a name for that kind of meeting?

17 **A. More of like a briefing, I guess, would**
18 **be a good name.**

19 **Q.** Had you prior to that December 14 meeting
20 ever participated in a briefing with members of the
21 county attorney's office where the medical
22 examiners were there?

23 **A. No.**

24 **Q.** Do you know how it was that the medical
25 examiners were present? It's a yes or no, if you

1 know.

2 **A. No.**

3 **Q.** Did you have information to present to
4 the medical examiners?

5 **A. I really don't remember if the purpose of
6 the meeting was to present the case to the medical
7 examiners or the county attorney's office or both.
8 I remember thinking that it would be good if I
9 could just present it to everybody at once.**

10 **Q.** And let's talk about your relationship
11 with the medical examiners. Is it standard
12 operating procedure for you to offer evidence from
13 your investigation to the medical examiners?

14 **A. Yes.**

15 **Q.** And explain that to the jury.

16 **A. Well, the medical examiner's office is
17 not like a coroner's office where they have
18 investigators that go out and do their own
19 investigation. They rely on the local law
20 enforcement agency to do a death investigation and
21 pass information along to the medical examiner's
22 office.**

23 **So usually, like I said before, if there
24 is a suspicious death, we'll attend the autopsy and
25 explain to the medical examiner the circumstances**

1 **of how the body was discovered -- you know -- if
2 there were gunshot wounds, if there was a gun
3 involved, if it looked like a suicide, whatever the
4 case may be. We'll describe what we saw at the
5 scene with the medical examiner's office.**

6 **Q.** In your relationship with the medical
7 examiner's office, is it customary that your office
8 would be doing interviews of witnesses to a crime
9 and not somebody from the medical examiner's
10 office?

11 **A. Yes.**

12 **Q.** Is it customary to share that information
13 with the medical examiners?

14 **A. Yes.**

15 **Q.** Did you in that meeting present
16 information to the medical examiners with the
17 belief that it would be information that they would
18 rely upon in determining -- reaching their
19 conclusions as to the cause of death?

20 **A. No. Not really.**

21 **Q.** What was your anticipation?

22 **A. I wanted everybody to be on the same page
23 and to tell them what I had learned. The cause of
24 death -- I think that they usually determine
25 medically what caused the death. But that's,**

1 **basically, what I remember about that meeting.**

2 **Just so everybody could get on the same page. We
3 had medical examiners from different counties
4 involved. I wanted everybody to get the same
5 information and share information.**

6 **Q.** What do you mean when you use the word
7 "get on the same page"? Were you trying to control
8 decisions reached by medical examiners?

9 **A. No. Not at all.**

10 **Q.** What do you mean when you say "get on the
11 same page"?

12 **A. So we all have the same information. The
13 Coconino County Medical Examiner may get
14 information that the Yavapai County Medical
15 Examiner doesn't have or that I don't have so we
16 can share the information that we're getting.**

17 **Q.** Would you explain to the jury why it is
18 we had medical examiners from two different
19 counties involved in this case?

20 **A. Yes. James Shore and Kirby Brown were
21 transported to the Verde Valley Medical Center,
22 pronounced deceased there, which is Yavapai County.
23 Liz Neuman was flown to Flagstaff where she
24 survived for, I believe, nine days and finally
25 passed away.**

1 **Since the nature of her injuries occurred
2 in Yavapai County, then both the Yavapai County and
3 Coconino County Medical Examiner's Offices were
4 involved. Since she died in Coconino County, the
5 Coconino County medical examiner, Dr. Mosley, did
6 the autopsy.**

7 **Q.** Without telling the jury what you had
8 found out in your investigation, can you describe
9 for the jury what you had done in terms of your
10 investigation prior to this December 14 meeting.

11 **A. We had interviewed multiple participants
12 to the Spiritual Warrior program and several other
13 James Ray events who had attended these events
14 from, I believe, 2003 on to 2009.**

15 **Q.** Did you have any results back from
16 testing?

17 **A. I don't remember.**

18 **Q.** Did you have any autopsy reports before
19 that meeting?

20 **A. No.**

21 **Q.** And without telling the jury what you put
22 in the PowerPoint, tell the jury what the purpose
23 of the PowerPoint presentation was.

24 **A. Just to share information.**

25 **Q.** Did you hand pick the information that

1 went in the PowerPoint?

2 **A. No.**

3 **Q. What were you looking for in terms of the**
4 **information that went into it?**

5 **A. We were looking for a summary of the**
6 **facts from several different witnesses from several**
7 **different years.**

8 **Q. At that meeting did you -- without**
9 **telling the jury what you had learned as a result**
10 **of your interviews -- how many hours of interviews**
11 **would you say you had done up to that point?**

12 **A. I would say it was hundreds.**

13 **Q. And was that with the assistance of other**
14 **detectives?**

15 **A. Yes. Several detectives.**

16 **Q. When another detective does an interview,**
17 **how do you become familiar with what that detective**
18 **learned in the interview?**

19 **A. It depends. In this particular case, a**
20 **lot of the initial interviews were transcribed**
21 **because we were doing so many interviews, nobody**
22 **had time to write a summary or listen to the**
23 **interviews and write a report on the interview. So**
24 **we sent them off to be transcribed. And the**
25 **transcriptions were -- most of them were reviewed**

1 later by me.

2 **If there was something significant that**
3 **was found out, usually the detective would call me**
4 **and say -- you know -- hey. I learned something**
5 **significant from somebody.**

6 **Q. You just mentioned a summary or report.**
7 **Is that the standard practice?**

8 **A. Yes.**

9 **Q. And explain that for the jury.**

10 **A. We usually -- if we do an interview of a**
11 **witness, we'll later listen to that interview and**
12 **write a synopsis of what they said.**

13 **Q. And what happens to that report?**

14 **A. It gets placed into our**
15 **computer-generated report system, which is called**
16 **"Spillman," which we have, essentially, a computer**
17 **program where we can put all of our reports and**
18 **supplemental reports into the same computer system**
19 **so if you want to go look at a case and all the**
20 **reports, it's all right there.**

21 **Q. Does somebody approve the reports that**
22 **detectives write?**

23 **A. Yes.**

24 **Q. Who is that?**

25 **A. It would be the detective's sergeant.**

1 **Q. Do you know why you have somebody approve**
2 **your reports?**

3 **A. It's good to have somebody check your**
4 **reports before they're approved. It's common**
5 **practice that at pretty much every level of the**
6 **sheriff's office that the supervisor will check the**
7 **report and make sure that there is nothing wrong**
8 **with it before they approve it.**

9 **Q. Does that also allow the sergeant to**
10 **provide input to you on the investigation?**

11 **A. Yes.**

12 **Q. At that meeting, Detective, was there a**
13 **discussion about the cause of death? This is yes**
14 **or no.**

15 **A. Yes.**

16 **Q. And who had that discussion?**

17 **A. The different medical examiners that were**
18 **present.**

19 **Q. And did you learn at that meeting from**
20 **the medical examiners what their conclusion was as**
21 **to the cause of death regarding the three victims?**
22 **That's a yes or no.**

23 **A. Yes.**

24 **Q. Was that the first time that you learned**
25 **about the medical examiner's conclusion?**

1 **A. Yes.**

2 **Q. After that meeting were the autopsy**
3 **reports at some point then issued by the medical**
4 **examiner?**

5 **A. Yes.**

6 **Q. But as of December 14, had you learned**
7 **from the medical examiners what their ultimate**
8 **conclusion was about the cause of death?**

9 **A. No.**

10 **Q. When did you learn the ultimate**
11 **conclusion?**

12 **A. I don't recall. It was whenever the**
13 **autopsy reports were released.**

14 **Q. At that meeting did you learn from the**
15 **medical examiners what they believed was the cause**
16 **of death?**

17 **A. Yes.**

18 **Q. What you learned at that meeting, was**
19 **that any different than what was ultimately in the**
20 **autopsy report?**

21 **A. No.**

22 **Q. What did you learn at the meeting, then,**
23 **about the medical examiner's opinion as to the**
24 **cause of death of Kirby Brown?**

25 **MR. KELLY: Your Honor, objection. Requesting**

1 hearsay response.

2 THE COURT: Sustained.

3 MS. POLK: Your Honor, this information is not
4 offered for the proof, but, again, to explain the
5 course of this detective's investigation.

6 MR. KELLY: Judge, did I hear the prosecution
7 say it's not offered for truth?

8 MS. POLK: Your Honor, the autopsy reports are
9 in evidence. It's offered to prove when this
10 witness --

11 THE COURT: Are the autopsy reports going --
12 they are in evidence.

13 MS. POLK: Two of three are, Your Honor.
14 Dr. Mosley hasn't testified yet.

15 MR. KELLY: And, Judge, we've heard from the
16 witnesses. So I don't know what this witness's
17 interpretation of their conclusion is.

18 MS. POLK: I'm not asking for his
19 interpretation. I'm asking for what he learned was
20 the cause of death.

21 THE COURT: Again, realizing through this
22 witness it would not be offered for the truth
23 anyway. It would only be offered to explain his
24 actions.

25 You may proceed.

1 Q. BY MS. POLK: With respect to Kirby
2 Brown, did you learn what the medical examiner's
3 opinion was as to the cause of death?

4 A. Yes.

5 Q. And what did you learn?

6 A. **That it was heat stroke.**

7 Q. With respect to James Shore, did you
8 learn what the medical examiner's opinion was as to
9 the cause of death?

10 A. Yes.

11 Q. What was it?

12 A. **It was heat stroke.**

13 Q. With respect to Liz Neuman, did you learn
14 from the medical examiner what his opinion was as
15 to the cause of death?

16 A. Yes.

17 Q. And what was it?

18 A. **It was multisystem organ failure due to
19 hyperthermia due to prolonged sweat lodge exposure.
20 And I'm not sure those are the exact words. But
21 something to that effect.**

22 Q. In your investigation, Detective, did you
23 interview a man named Michael Barber?

24 A. Yes.

25 Q. When did you interview Mr. Barber?

1 A. **May I refer to my notes?**

2 Q. Yes.

3 A. **On June 10, 2010.**

4 MS. POLK: Your Honor, what time to you want
5 me to stop today?

6 THE COURT: Close to 4:00.

7 MS. POLK: This might take a little bit
8 longer --

9 THE COURT: We'll go ahead and recess if
10 that's what you're suggesting.

11 We'll go ahead and recess, ladies and
12 gentlemen, at this time. Please remember the
13 admonition. Please be assembled again tomorrow at
14 9:15.

15 Detective, you are excused at this time.

16 I'm going to ask the parties remain for a
17 moment.

18 (Proceedings continued outside presence
19 of jury.)

20 THE COURT: The jury has left.

21 MR. KELLY: Judge, I would just like to state
22 on the record before we go into this area of
23 inquiry by the State of Arizona, it has significant
24 Fifth Amendment implications.

25 THE COURT: It has to do with Mr. Barber.

1 MR. LI: Yes, Your Honor. Your Honor, the
2 Court recalls it was the subject of a motion in
3 which constitutional --

4 THE COURT: Right. He was the one that did
5 the audio?

6 MR. LI: Yes. And constitutional issues were
7 raised. I think the state asked for the tapes at
8 some point. We asked them for authority under
9 which they could get the tapes. They filed the
10 motion, as the Court recalls, the chronology. And
11 then once the legal issue was decided, we complied
12 with the order.

13 THE COURT: So, Mr. Kelly, the Fifth Amendment
14 concerns other than what have been briefed?

15 MR. KELLY: Your Honor, I don't know what the
16 questions or answers are, but the prosecutor
17 intends to ask this witness in regards to the
18 circumstances surrounding the disclosure of the
19 tape. It can implicate Fifth Amendment concerns,
20 and I want to put that on the record.

21 It seems like, as Mr. Li has said, we go
22 right up to the boundary and stop. At some point
23 this repeated conduct creates significance
24 concerns.

25 MR. LI: Your Honor, if I may make just a

1 little bit of record and make a request of the
2 Court, with the Court's permission?

3 THE COURT: I want to note, first, Ms. Polk,
4 is that one of the areas you contemplate
5 discussing?

6 MS. POLK: Your Honor, yes. The issue will be
7 the audio obtained from Michael Barber, which is
8 the audio of the Spiritual Warrior seminar. The
9 Court has already heard arguments on the Fifth
10 Amendment matter and ruled upon it in the decision
11 that the defense provided to the state.

12 We have briefed the Court on the Fifth
13 Amendment issue. There are no Fifth Amendment
14 issues. This does not compel statements of a
15 defendant under situations of the Fifth is
16 concerned. And the Court has already ruled upon it
17 when ordering the defense to turn their audio over
18 to the state.

19 MR. LI: I think the state's going to make
20 some sort of suggestion about delay and not
21 suppression and those sorts of things. That's the
22 Fifth Amendment issue. When a person asserts their
23 rights and subjects it to the Court for ruling,
24 that's not to be held against the person,
25 particularly when it has to do with constitutional

1 rights.

2 And so I think where the state is going
3 with this is to make some sort of suggestion, along
4 the lines of all the discussions we've had at
5 sidebar, that somehow evidence was spoliated or
6 hidden or suppressed by the defense, which is
7 simply not the case.

8 You know, all of that was out in the
9 open. We sent a letter to the state saying, give
10 us some authority. If you want to file a motion,
11 file a motion. They didn't file a motion until
12 January or something like that. And I don't think
13 that's fair.

14 THE COURT: I think it was discussed this
15 morning. December is when it was filed, and it was
16 produced by the end of January.

17 MR. LI: Fair enough.

18 MS. POLK: Your Honor, I can tell you the line
19 of questioning that I would propose --

20 THE COURT: Please.

21 MS. POLK: -- to ask of the witness is the
22 date that he interviewed Michael Barber, which is
23 June 10 of 2010. That on that date he learned that
24 Michael Barber had audiotaped the Spiritual Warrior
25 seminar. He learns from Mr. Barber that Mr. Barber

1 had delivered the drive containing this audio to
2 James Ray International the day after the search at
3 Carlsbad, which is why the state did not have it.
4 And the state, Your Honor, had attempted to
5 determine whether or not we had it during that
6 interm before we filed the motion.

7 The next question from the witness was
8 that after a court hearing, did he receive the
9 audio on January 31, 2011? Had he listened to the
10 audio? How many hours is it? What role did this
11 audio play in the conclusions he reached in his
12 investigation? And this is the first time, then,
13 that he hears Mr. Ray's actual words of the
14 briefing for the participants before they entered
15 the sweat lodge.

16 MR. LI: Your Honor, may I lay a little bit of
17 this --

18 THE COURT: Yes. I did want to note, first,
19 what the questions might be.

20 MR. LI: Just for the record, we asked for a
21 meet and confer with the state about this issue
22 back in June when they made the request. The state
23 ignored our request for a meet and confer and
24 simply filed the motion in December, six months
25 later.

1 And I think there is a subtle innuendo --
2 not so subtle, frankly -- innuendo that somehow the
3 defense has been suppressing or spoliating
4 evidence. I just note for the record something
5 that Mr. Kelly in our sidebar discussion about
6 scripts and what have you. The state actually has
7 every computer that James Ray International ever
8 had, still in its possession.

9 So to the extent that they want to
10 actually look at it, they could. And they could
11 probably find any script, anything that they want.
12 They just haven't done it. The problem is that the
13 state, due to its own decisions or allocations of
14 resources, whatever, decides not to do something
15 and then gets up on -- asks of this case agent --
16 somehow puts the burden back on the defense as if
17 we've done something to impede their investigation.

18 They made a choice in June last year not
19 to meet and confer, not to file a motion, and
20 waited all the way until December, as the Court
21 noted. And that's not the defense's burden. And
22 I'll rest on that. But I have a point I'd like to
23 make after this.

24 THE COURT: Thank you.

25 Ms. Polk, I don't understand why the

1 procedural aspect would have to be involved. When
2 the litigation actually started, it was resolved
3 fairly quickly. There were some rather complex
4 issues involved in it. I know I had to look into
5 the law in some depth, and it was briefed quite
6 thoroughly by the parties.

7 MS. POLK: I'm laying the foundation for the
8 admissibility of the audio if the defense wants to
9 stipulate to its admission. And I don't need to
10 ask the witness those questions.

11 I do want to address something that
12 Mr. Li just raised, which is the suggestion that
13 the state took all of Mr. Ray's computers. We did
14 not. And on the subject of the state's access to
15 the computers that we did seize, I would ask
16 Mr. Hughes to address that. But there were
17 substantial obstacles placed in our path to ever
18 being able to search those records. But we did not
19 seize all the computers.

20 MR. LI: The only obstacles, Your Honor, that
21 are placed in the path of the state, is
22 inadmissibility to search evidence that is
23 currently in its possession is the law. And the
24 law relates to the attorney-client privilege and
25 other issues.

1 So I simply put the state on notice, if
2 you want to search those things, do so at your own
3 risk. I was a prosecutor for many years. I know
4 how to search a computer. And I was simply telling
5 the State of Arizona that if you're going to search
6 a computer, you better have teams in place that
7 respect attorney/client privilege and do all these
8 various procedures before you just open it up and
9 look at it. But it's up to you, because you have
10 the computer.

11 So the idea that we're putting obstacles
12 in their way -- and I'm sorry to get rhetorical --
13 but the idea that we are putting obstacles in their
14 way, the only obstacle, Your Honor, is the law.

15 THE COURT: It would have been a matter for
16 litigation if there was an issue that needed to go
17 to the Court.

18 MR. LI: Indeed.

19 THE COURT: And be decided, it would seem to
20 me.

21 But I want to go to Ms. Polk's suggestion
22 that if there is foundation, then there is no need
23 to go into this with the detective.

24 MR. LI: I think the issue on that -- I guess
25 I now understand the state to be suggesting that

1 all five days of the tapes should now should be
2 admitted. I think that's what the state is now
3 saying. And I don't think that's a foundation
4 issue. I mean, we've already -- you know --

5 THE COURT: Then let's treat it in that
6 fashion, Ms. Polk, because I think the first thing
7 you're talking about is just no argument about
8 where it came from and anything like that. It's
9 going to be in evidence if other potential
10 obstacles are cleared.

11 MR. LI: Let me just address the clips that
12 have already been introduced.

13 THE COURT: What about the initial part?
14 Before we get to talking about how many hours might
15 be offered --

16 MR. LI: Well, the way to address that, Your
17 Honor, is that there are a number of clips that the
18 state has introduced relating to Mr. Ray's
19 statement at the Spiritual Warrior seminar, the
20 lectures he's given.

21 We've not objected on foundation grounds
22 to the extent that foundation means was it recorded
23 at the Spiritual Warrior seminar. Not -- you
24 know -- did somebody hear it and all those other
25 foundational issues, more complex foundational

1 issues.

2 So if the question is if all the state is
3 trying to establish is that the exhibits that have
4 been entered into evidence are true and correct
5 copies of what people -- what Mr. Ray said at the
6 Spiritual Warrior seminar, we'll stipulate to that.
7 We have other objections to that.

8 THE COURT: Okay. We'll take this a step at a
9 time.

10 Ms. Polk, that initial stipulation.

11 MS. POLK: Your Honor, we'll accept that
12 stipulation. And from day one we have made it
13 known that we intend to offer the entire audio as
14 an exhibit in this trial. That is no surprise to
15 the defense.

16 THE COURT: I've heard that. So that obviates
17 the need for the detective to go into this
18 procedure; correct?

19 MS. POLK: Your Honor, the questions I
20 outlined - I'm not sure what that term "procedure"
21 means. But the questions I outlined were very
22 simple, which is, how did he get it, and did he
23 listen to it, and did that help him understand what
24 witnesses had been telling in this trial? And that
25 this is the first time he hears defendant's actual

1 words, what he told participants before they went
2 into his sweat lodge.

3 MR. LI: There are always -- the state is
4 always proffering arguments for why something might
5 be admissible and the gliding by all of the
6 prejudicial and improper purposes behind why
7 they're asking these questions or the inferences
8 that the jury may draw from them.

9 And that's actually -- I'm not going to
10 say well, yes, for the record, I'd like to lay
11 about the last line of questioning relating to
12 whether the defense provided information to the
13 prosecution. And I will get to that.

14 But the point is that, as the Court has
15 identified, the foundation -- all they're trying to
16 lay is the foundation to the authenticity of the
17 various exhibits. We'll stipulate to that. We
18 gave them. So we don't dispute those are tapes
19 made during the Spiritual Warrior seminar.

20 We have other objections which we would
21 assert and continue to assert against the idea that
22 all five days should be part of this trial.

23 If I can just highlight the reason why
24 this one is so problematic is because the arguments
25 at issue related to an assertion of Fifth Amendment

1 rights. If this were simply just some -- you
2 know -- some other issue, there may be smaller
3 concerns. But this was a constitutional concern
4 that was raised by the defense.

5 THE COURT: And I thought we'd gotten past
6 that, that there wasn't going to be this suggestion
7 that somehow there was obstruction by the defense.

8 Is that something you want to suggest,
9 Ms. Polk?

10 MS. POLK: No, Your Honor.

11 And throughout the sidebars and the
12 arguments today in court, with every piece of
13 evidence that is seized or obtained by the state,
14 if we can lay the foundation, if we can show it's
15 relevant, then it's admissible.

16 And objections raised by the defense to
17 much of the evidence today goes back to this
18 accusation that somehow we are trying to raise
19 impermissible argument, and, therefore, it should
20 be a basis to keep out evidence that is otherwise
21 admissible. These are the defendant's own words.
22 We've had argument and legal briefing on this whole
23 issue.

24 I'm not understanding what Mr. Li is
25 saying right now. This witness is going to lay the

1 foundation for how he gets it, that he listened to
2 it, he listened to all of it, that it is consistent
3 with what witnesses have been saying, that it's the
4 first time he hears the briefing by the defendant.
5 And then I'm going to move to admit it.

6 MR. LI: With all due respect, Your Honor,
7 Ms. Polk at sidebar made a suggestion that a
8 permissible inference was that evidence had been
9 destroyed relating to some purported scripts about
10 the sweat lodge speech, notwithstanding the fact
11 that the state has in its possession the computers
12 and laptops and all sorts of things upon which all
13 of these scripts were made. That's exactly the
14 inference the state wants to make and argued at
15 sidebar. And the Court ruled it was speculative,
16 pure speculation, and not admissible, and those
17 were improper questions.

18 I believe, notwithstanding the fact that
19 the state is now avowing that they're not trying to
20 make that inference and have never made that
21 inference, that is exactly the inference that
22 they're making and trying to make in front of this
23 court and in front of this jury.

24 MS. POLK: Your Honor, these recordings are
25 the best evidence of what occurred that week.

1 MR. LI: This is a separate issue.

2 THE COURT: That's a separate issue. If we're
3 talking about how many hours of recording are going
4 to be provided, that's just a different issue. If
5 it's, basically, statements by Mr. Ray, normally
6 those things, if they are -- relate to the case,
7 they're admissible normally. I don't know. I
8 don't know if they all relate to the case or issues
9 in the case or not.

10 MR. LI: Your Honor, this has been obviously a
11 heavily litigated area in this particular case.
12 And we have taken the consistent position that
13 they're not relevant because there is no way to
14 impute what is said on these tapes into the state
15 of mind of the folks who passed away. It's an
16 impossible logical gap to make.

17 The second point I'd make, Your Honor,
18 which is critical, and it's the subject of one of
19 our motions, is there is a First Amendment issue
20 here. Frankly, Mr. Ray is being afforded less
21 protection under the First Amendment than many,
22 frankly, Nazis and other people who are inciting
23 violence.

24 Your Honor, just for the record, the
25 Supreme Court case law that we've cited in our

1 brief requires certain standards to be met before
2 First Amendment conduct can be held to have induced
3 other people to do things. That's basic Supreme
4 Court case law.

5 There are imminency, likelihood, and one
6 other. And it's in our briefs. But we've briefed
7 that issue very carefully, and we've submitted it
8 to the Court. We think it's an important issue.
9 It will be the subject of our Rule 20 motion as
10 well.

11 But the point is that the state just
12 wants to introduce all of this evidence without any
13 theory, permissible theory, of relevance.

14 THE COURT: The First Amendment issue. I've
15 addressed that. And I've talked about what I see
16 as being a very important aspect. And that is the
17 arguable presence of a legal duty and words said
18 within that context that perhaps people rely on or
19 somehow are affected by. I've discussed that.

20 MR. LI: And I under that, Your Honor.

21 THE COURT: I can see -- and how there can be
22 problems. Some of the material that I did not
23 permit today raises those kind of concerns. Just
24 say that somehow -- just considering this speech is
25 somehow related to alleged criminal conduct without

1 more connection. I understand the argument.

2 But, Ms. Polk, you're talking about
3 wanting to play for the jury hours of just
4 discussions, reciting poems. What's there?

5 MS. POLK: Your Honor, I don't intend to play
6 this whole tape for the jury. I do believe it
7 should be admitted. It is the best evidence of the
8 defendant's words. What has been admitted already
9 are various clips.

10 The defense has suggested that the
11 state's clips are taken out of context. The audio
12 gives complete context to the information the jury
13 has heard. If the jury decides they want to listen
14 to it after it's been admitted, that would be their
15 right. I don't intend to play it, but I do believe
16 the defendant's words are the best evidence of what
17 occurred that week.

18 Again, these are the defendant's word.
19 These are the words that he used all week long that
20 witnesses have testified as to how they were
21 influenced and their mind-set when they go inside
22 the sweat lodge, and that's why it's relevance.

23 THE COURT: I can certainly understand the
24 presweat lodge discussion as being relevant. But,
25 Ms. Polk, you're saying there is just no limit.

1 Anything said during that week has to be pertinent
2 to the case. Anything that Mr. Ray says during
3 that week is relevant to the case and would
4 constitute nonhearsay as an admission.

5 Is that what you're saying?

6 MS. POLK: Yes, Your Honor. The defendant's
7 words are the hearsay exception. What's on this
8 audio is the best evidence of what occurred that
9 week. There has been extensive questioning of the
10 participants suggesting they shouldn't have been
11 influenced or what the defendant really meant when
12 he said what he said. And, again, this is evidence
13 of what occurred that week. This is an audio of
14 the week of his words.

15 THE COURT: Mr. Li.

16 MR. LI: I think it's -- in addition, it's
17 cumulative and consumptive of time. But there is
18 no possible theory that you can simply take a
19 five-day seminar and admit all of it with things
20 that Mr. Ray says, things that various participants
21 say about their personal lives, random comments
22 about all sorts of things, and then somehow,
23 without any link at all, attempt to suggest that
24 somehow it's linked to the crime of manslaughter.

25 MS. POLK: Your Honor, the link has been made

1 through the participants that they have testified
2 to. It's the cumulative effect of the events of
3 the week that affect their mind-set and their
4 conduct in that sweat lodge.

5 It's not just what happens, what is said
6 to them 45 minutes before going in the sweat lodge.
7 It's from the time they get there -- and each --
8 witness after witness has testified about this.
9 That it's the cumulative effect of each of these
10 events of the defendant's words that affects their
11 mind-set when they enter that sweat lodge, not just
12 that 45-minute briefing.

13 MR. LI: And, Your Honor --

14 THE COURT: And I've never said that would be
15 the only admissible statement.

16 MR. LI: When the county attorney says it's
17 the cumulative effect of Mr. Ray's words and what
18 impact it had on people, we are literally talking
19 about the impact on words and whether they induce
20 conduct. And we are literally walking right over
21 the First Amendment.

22 And the state has never even attempted to
23 even tip its hat to the United States Supreme Court
24 cases exactly on that point.

25 And I understand the Court's ruling. But

1 we are going well beyond the nature of the Court's
2 ruling. We're -- I mean, the state is simply
3 suggesting that the cumulative effect of words
4 induced people to do "X."

5 If the Court looks at our briefing on
6 this topic, there are very specific and stringent
7 requirements before the state, the government, can
8 prosecute somebody.

9 THE COURT: And none of them within the
10 content of a legal duty, that I can see.

11 MR. LI: And the state has never identified a
12 legal duty. That's another point which will be the
13 subject of our Rule 20 motion. The state has never
14 even admitted that it has a duty or has to prove a
15 duty.

16 And the case law is quite clear on that,
17 that it does, independent of the manslaughter
18 statute. The State of Arizona stood in front of
19 the Court and said that all they have to do is cite
20 the -- the duty is don't commit manslaughter.
21 That's not the law. And so as a consequence, Your
22 Honor -- anyway, this is not admissible.

23 THE COURT: I've never had a trial, I don't
24 think, where without an agreement of the parties as
25 to the statement, the nature of the statement, a

1 statement has come in that I haven't reviewed. I'm
2 not aware of that.

3 I understand how encompassing my
4 801(d)(2)(b) -- and, of course, if it's a statement
5 of a party opponent, it's not hearsay at all. It's
6 not an exception. It's just not hearsay. But I've
7 never had something, anything remotely like this
8 where statements days ahead of time, continuous
9 statements.

10 MS. POLK: Your Honor, with respect to
11 confessions, obviously the Court hears about those.
12 And there are court hearings and a determination by
13 the Court that statements of a defendant are
14 admissible.

15 Outside of the context of confessions,
16 defendant's statements are admissible. They are
17 not hearsay, and they frequently will come into a
18 trial.

19 Your Honor, I wanted to respond to this
20 issue of duty and a failure to act and the
21 suggestion that the state has not provided the
22 Court with authority or responded to that argument.

23 I think both counsel and the Court know
24 that the law -- and the state's position is that
25 the law is, with respect to conduct, the state does

1 not have to show a duty to act when the crime is
2 the conduct. If the theory for the crime is a
3 failure to act --

4 THE COURT: Omission.

5 MS. POLK: An omission. Then there is a duty
6 to show a legal or statutory duty. And that's that
7 distinction that Mr. Li was just blurring there.
8 And we provided the Court with authority on that
9 position.

10 MR. LI: Blurring?

11 Your Honor, I think actually we filed a
12 motion that laid out what the constitutional
13 requirements are. I believe -- and I don't want to
14 get blurring. I don't want to react too much to
15 that.

16 I believe Mr. Hughes actually got up
17 there and told this court that in the context of an
18 admission -- omission that the state did not have
19 to prove a duty. And --

20 THE COURT: No.

21 MR. LI: I think the Court -- I recall the
22 Court asking, are you telling me that you don't
23 have to show a duty?

24 And Mr. Hughes said, yes.

25 But be that as it may.

1 THE COURT: I think Ms. Polk is just now said
2 with the case of omissions there has to be a duty
3 shown. But, again, I do recall Mr. Hughes
4 indicating that that could be found within the
5 criminal statute.

6 MR. LI: Yes.

7 THE COURT: And the law is clear that it
8 cannot.

9 And, Ms. Polk, you're correct. I mean,
10 most of the time when I'm looking at statements, it
11 has to do with voluntariness and those issues. I
12 don't know of any item of evidence that's contested
13 like this where I don't actually know what's there
14 before I rule on it.

15 And if there are First Amendment issues
16 that are implicated because it just can't -- I
17 don't know. I mean, who's the audience? With the
18 sweat lodge it was pretty clear who the relevant
19 audience would be. But with these other things,
20 what are they.

21 So yes. You're right. Normally it has
22 to do with confession or a statement of some sort
23 and whether it's voluntary. But this is a
24 contested item of evidence that I don't even know
25 what's on it. How do I rule on that?

1 MR. KELLY: Judge, I just have much more
2 simple approach. And it's along the lines of what
3 you're talking about. We have now raised issues
4 relating to 610, religious beliefs, relevancy, 403,
5 prejudice, how this information runs afoul of some
6 prior Court orders regarding finances of JRI and
7 James Ray, as well as the First Amendment, as
8 articulated by Mr. Li. Many issues.

9 And the only way -- and I'm not waiving
10 any argument as simply not admissible. But before
11 a decision could be made -- and the final one is
12 hearsay. Because we have people who are not
13 Mr. Ray speaking. The Court would have to listen
14 to this tape. And I've tried. I've listened for
15 more hours than I care to count.

16 And then from a very practical
17 standpoint, if it's admitted, then the jury is
18 going to have to listen to it. You don't admit
19 evidence anticipating the jury is not going to
20 consider it.

21 So for all the reasons that have been
22 articulated during the past month and a half about
23 this recording -- if I recall, the very first
24 witness I cross-examined, we discussed this issue.
25 And now it's resurfacing. I thought it was over.

1 Anyway, that was just a more simplistic,
2 practical approach is you would have to listen to
3 it before it can be admitted, if you are going to
4 admit even a portion of it.

5 We did stipulate to the presweat lodge
6 presentation, avoiding the necessity of you
7 reviewing those statements. Other than that we're
8 not agreeing.

9 THE COURT: If there were going to be portions
10 offered, I have to be able to review that. And I'm
11 not going to be able to do that this evening.

12 Who do you have planned for witnesses,
13 Ms. Polk?

14 MS. POLK: Your Honor, we have
15 Detective Sergeant Frank Barbaro tomorrow. I'll
16 still be questioning Detective Diskin, and there is
17 cross-examination. And then are you asking me who
18 the rest of the witnesses --

19 THE COURT: Well, just for the next two days
20 or so, trial days.

21 MS. POLK: Those are the issues -- Your Honor,
22 with respect to the audio, let me respond to the
23 Court tomorrow rather than asking the Court at this
24 point to listen to it all. Let me -- I still would
25 like to offer evidence as to how we get it so that

1 we have an audio. The jury -- it's unusual that we
2 have the audio of his briefing, for example.

3 So I'd still like to establish through
4 Detective Diskin how it is. We don't have to talk
5 about a court hearing. But he interviews Michael
6 Barber and then ultimately obtains the audio,
7 learns from Michael Barber that he has
8 tape-recorded much of what went on, and that's why
9 we have audio here in the Court.

10 With respect to moving to introduce it,
11 I'll withdraw that. And then if I intend to renew
12 that motion, I'll raise it with the Court later.

13 Your Honor, I do have some other issues
14 with respect to Detective Diskin's testimony.

15 THE COURT: Before we leave the audio -- it's
16 a process. What portions you are going to offer
17 have to be provided to the defense so I know what
18 the specific objections might be, whether they
19 are -- you know -- gratuitous hearsay, First
20 Amendment, whatever they might be. So that's the
21 process. Okay.

22 Ms. Polk, what other items about
23 Detective Diskin's testimony?

24 MS. POLK: Yes, Your Honor. The detective, if
25 allowed to testify about the course of his

1 investigation, would testify about the interviews
2 of participants from prior sweat lodge ceremonies
3 of Mr. Ray and the reasons why this detective then
4 focuses on Mr. Ray's conduct, and, in particular,
5 his conduct in creating this extreme sweat lodge
6 and how that plays a role in decisions to do or not
7 to do further testing.

8 Before I ask those questions of the
9 witness, I want to make sure that the Court -- that
10 there is not going to be an issue with the
11 responses that the witness would give. But what
12 this witness would testify to is that he
13 interviewed participants in the sweat lodge from
14 2003, '04, '05, '06, '07, '08, as well as '09; that
15 he interviewed former employees of Mr. Ray; he
16 interviewed the families of the three victims; that
17 he interviewed people who had attended other James
18 Ray International events; that he followed up where
19 appropriate; that he's testified about the meeting
20 where he learned from medical examiner their
21 opinions.

22 And what this detective concluded is that
23 there was a pattern that was emerging, which has an
24 effect on this detective and the course of the
25 investigation. And specifically that's the pattern

1 that we have been talking about. It's been the
2 subject of many discussions in this courtroom, that
3 it is Mr. Ray's conduct that causes the deaths; and
4 that when it's a ceremony not performed by Mr. Ray,
5 that there is no problems. When it's a ceremony
6 performed by Mr. Ray, there are problems.

7 The Court has issued a ruling with
8 respect to the 2005 Daniel Pfankuch incident. But
9 this detective, after talking to Daniel Pfankuch,
10 talking to Michelle Pfankuch, talking to several
11 other witnesses to that Pfankuch incident, learned
12 that after Daniel Pfankuch was in the sweat lodge,
13 suffered heat exhaustion, and that's what the
14 medical records support, went into a state of
15 unconscious and afterwards came back to
16 Angel Valley and spoke to the defendant. And the
17 defendant's focus in 2005 was trying to find out
18 about what the defendant characterized as an
19 altered experience and made the conclusion that
20 there was a connection to using heat and
21 accomplishing an altered experience.

22 This detective would testify that that
23 affected, then, conclusions that he's reaching in
24 his investigation and then further decisions about
25 what to do in the investigation, what to test and

1 where to look for more information.

2 What the detective realized is that
3 the -- it's not a sweat lodge. It's a
4 heat-endurance test being held inside of a sweat
5 lodge ceremony, and eventually learned that people
6 do die when exposed to extreme heat. And he
7 realized it's extreme heat that is the source of
8 the symptoms experienced by the three victims.

9 MR. KELLY: Judge, I want to point out one
10 fact. The state's witness, Dr. Mosley, on
11 April 19, 2011 -- and you have the transcript
12 attached to a pleading we filed last week -- opined
13 that it would be dangerous to do exactly what the
14 state wants to do. Their own witness.

15 So now Detective Diskin somehow has some
16 basis to provide an opinion as to the cause of
17 death and how they're heat related over a six-year
18 time span. We go right back into the arguments
19 that we have been discussing extensively in this
20 case repeatedly. I believe you used the word
21 several times, going into this would jeopardize
22 these proceedings.

23 We have motions for mistrial. We had one
24 today when we started going down that path. And
25 this appears to me to be purposeful conduct by the

1 government. And in a mistrial, Judge, I would
2 assert would be with prejudice.

3 THE COURT: Ms. Polk, it sounds to me like you
4 want to have Detective Diskin say, I talked to all
5 these people, looked at all this evidence, and I
6 just concluded it was heat that caused the deaths,
7 and that's what happened.

8 MS. POLK: Your Honor, that is what happened.
9 That is what I'm telling you -- Your Honor, the
10 suggestion by Mr. Kelly that there is purposeful
11 misconduct is inappropriate.

12 THE COURT: I want you to respond to that,
13 because, really, I've asked the parties not to --
14 there are pleadings filed. And, Ms. Polk, you can
15 address that. Go ahead.

16 MS. POLK: Your Honor, that's why I'm bringing
17 it up with the Court and counsel outside of the
18 presence of the jury. That's why I'm bringing it
19 up so that we don't have these questions in front
20 of jury, objections and the sidebars.

21 This is not improper for me to be raising
22 with the Court what this detective believed at the
23 time and what his testimony would be if he were
24 allowed to tell the truth. I realize there are
25 rulings and that we need to have testimony in

1 accordance with the rulings.

2 But the simple fact is if this witness
3 were allowed to just tell what happened and what he
4 thought, what I just told the Court is what he
5 would say. What I'm suggesting to the Court is
6 that that is what he would say.

7 But before we say it in front of the
8 jury, what are the guidelines? What can he say?
9 How far can he go? Because if we don't talk about
10 it ahead of time? Then we're going to be at yet
11 another sidebar because this detective
12 essentially -- once he takes an oath, I ask him to
13 tell the truth, this process asks him to tell the
14 truth.

15 And yet he's on pins and needles up there
16 because he really can't say what he believes. He's
17 not being allowed to testify for reasons that I
18 respect. But that's why I'm raising this outside
19 of the presence of the jury, so we can agree on
20 what it is that this witness can say so we don't
21 have objections, we don't have sidebars, we don't
22 have motions for mistrial.

23 THE COURT: It goes without saying it's the
24 truth whatever is said. But I just am having a
25 problem conceptualizing -- you're saying the

1 detective should just be able to get in and state
2 his belief as to what this is all about?
3 MS. POLK: Your Honor, I'm saying that the
4 reasons why he did what he did in the investigation
5 are because when he interviews everybody, he
6 realizes that it is the extreme nature of Mr. Ray's
7 sweat lodge that caused people to get sick and
8 ultimately three people to die.

9 THE COURT: That's his conclusion. And after
10 all the evidence I looked at --

11 Ms. Polk, I really don't like to
12 interrupt people.

13 Mr. Li, this has happened, and I don't
14 like to do that.

15 But I don't know how many times I have to
16 go over to make that jump from all the people for
17 all these prior sweat lodges had this certain level
18 of problem, and some of them come back, and some of
19 them become Dream Team members and become part of
20 this, that somehow means, oh. Now in this sweat
21 lodge that has drastically different consequences.
22 It all has to be connected. And a detective puts
23 that all together and then relay that to the jury.
24 I'm just --

25 MS. POLK: I would make it clear that it's

1 this defendant's conclusions. He is not the finder
2 of fact. It's relevant because it dictates the
3 course of his investigation.

4 But, secondly Your Honor, as I have told
5 the Court this morning, the state would like to
6 call Dr. Kent, who will answer some of the
7 questions that the Court has, who will testify that
8 in 2008 it was life threatening. And he believes
9 two people would have died if he hadn't been there
10 to assist them.

11 The problem is on cross-examination,
12 Mr. Kelly is going to question the detective about
13 all the things you didn't do, all the things you
14 didn't test. And where does that leave us on
15 redirect?

16 THE COURT: That might be -- that's a whole
17 different question than what we're discussing right
18 now. But to have all of the prior sweat lodge
19 information come in, again, through
20 Detective Diskin, and then have him say, I put this
21 all together, and this is just my opinion, and
22 that's why I did what I did, that's not
23 permissible.

24 With regard to Dr. Kent, I don't know the
25 right word to bring up as to why now this is being

1 presented.

2 MS. POLK: Your Honor, it's not now. The
3 state had noticed our intention to call him as a
4 witness on March 14, as soon as we learned about
5 him. There are no disclosure issues. The defense
6 has known about him. It's been in the Court
7 pleadings.

8 We were going to call him, as we were
9 going to call many witnesses who would talk about
10 the prior years when we had a ruling from the Court
11 that what happened on prior -- in prior years was
12 relevant to the issue of causation.

13 The Court continues to believe that what
14 happened in prior years is relevant to the issue of
15 causation, but based on a motion from the defense,
16 made the decision that we couldn't continue to call
17 witnesses. Dr. Kent is one of those witnesses that
18 we had intended all along to call. It's not why
19 now. He's been noticed since March 14 and was
20 going to be one of our trial witnesses.

21 THE COURT: Intended to call all along since
22 March 14, a month into trial?

23 MS. POLK: Immediately when we learned about
24 him.

25 MR. LI: Your Honor, that just, frankly, is

1 not -- well, the state has known about him
2 since 2009. He was provided -- Detective Diskin is
3 on tape saying to this guy something to the effect,
4 oh. I see you're on the list here.

5 And we've also filed papers, Your Honor.
6 We've just filed a motion relating to Dr. Kent --
7 Mr. Kent. We don't even know who he is.

8 THE COURT: Well, I'm not going to talk about
9 Dr. Kent anymore. It's been 90 minutes again.

10 MS. POLK: Your Honor, on the issue of
11 Detective Diskin's testimony, I won't ask those
12 questions. But there has been a repeated
13 occurrence in this case when doors are opened on
14 cross-examination, and then the argument is made
15 that the state does not get to go to those areas
16 that have been opened.

17 I won't ask those questions, but there is
18 no -- I'm certain that Mr. Kelly will be asking
19 this witness about he didn't test this, he didn't
20 test that, and he didn't test that. And then when
21 I come back, appropriate redirect would be, why
22 didn't you test them? And his answer is going to
23 be, based on all of the evidence he had, having
24 talked to participants at prior events, that he had
25 concluded that it was Mr. Ray's conduct and it was

1 the extreme heat that caused the deaths. And he
2 made a decision not to do this other testing
3 because that's where the evidence was pointing.

4 THE COURT: And that may happen on redirect.
5 That could happen, Mr. Kelly. I don't know. I
6 don't know what you're going to ask, but it could.

7 MR. KELLY: Judge, this is impossible to
8 confront this issue repeatedly with each and every
9 witness when I believe this court has clearly ruled
10 in regards to the admissibility of these prior
11 sweat lodges and comparison with other sweat
12 lodges.

13 When I have my outline here -- and you
14 bet. If I'm going to represent my client, I'm
15 going to ask the detective why he didn't test
16 certain items, why he didn't preserve the scene
17 longer, et cetera.

18 Now, it really is totally irrelevant as
19 to what his belief is. What the issue on
20 cross-examination is is good police practice in
21 conducting an adequate investigation to answer some
22 unknown issues that may exist in this case. Now,
23 how would that open the door to any prior sweat
24 lodge?

25 I think of this example: If the

1 detective was investigating burglary, and he
2 erroneously assumed that the defendant in that
3 burglary happened to be the guy next door who had
4 three prior burglary convictions, and the Court
5 said, hey. You're not going to talk about the
6 three prior convictions in the case in chief. And
7 if I asked a question, you didn't test his
8 fingerprint on the doorsill?

9 Yeah. I didn't.

10 Well, why is that?

11 Because I erroneously believed this
12 entire time that it was the next door neighbor.

13 And then it opens the door to the rulings
14 that exclude that type of evidence, whether it be
15 under 403 or 404(b), whether there is no causation
16 as indicated by Dr. Mosley.

17 I don't -- I'm at a quandary. If given
18 that last statement by Ms. Polk, if I ask the
19 detective what he did and didn't do in regards to
20 his investigation on October 9, I guarantee you I
21 will not ask him any questions about what he
22 learned other than during October 9 and October 10.
23 So that in no way opens the door.

24 In terms of propensity evidence or
25 character evidence, it would have to be questions

1 regarding good character. And in regards to what
2 he did not do in an investigation but left
3 unanswered or unresolved issues in his
4 investigation, that does not open the door.

5 The only thing that would open the door
6 is if I somehow made a statement like -- I can't
7 even think of a statement.

8 If I said, well, nothing has ever
9 happened in the past. No one went to the hospital;
10 correct? Obviously that would open the door to
11 2005. But simply asking questions about what he
12 did in 2009 does not open the door.

13 THE COURT: Mr. Kelly, I don't think it's a
14 direct comparison to bring up a long-recognized
15 exception to the character evidence rule that
16 priors are -- they are not admissible. You can't
17 presume that kind of conduct versus an
18 investigation where heat is a factor. I don't
19 think that's a direct comparison.

20 MR. KELLY: If -- let me put it this way: If
21 the detective testified that based on my 75
22 interviews, I believed heat was a factor, I'm not
23 objecting. And he's already testified that those
24 75 interviews spanned a time period between '03 and
25 '09.

1 So if I get up now and ask about the
2 wood, about the rat poison, about the insecticides,
3 about rocks, ash, size of this crime scene, the
4 length of the investigation, the investigators
5 used, et cetera, how would that open the door to
6 what happened in '05 or '07 or '08? It doesn't.

7 And it's also eliciting an opinion from a
8 detective who is not qualified. He's testifying,
9 according to the state, to the ultimate issue in
10 this case, which this jury has to decide. And his
11 opinion is based on hearsay. And that is totally
12 improper.

13 I understand that, well, I didn't test
14 the rocks because I thought it was heat.

15 I don't have a problem with that. But if
16 I ask him about not testing the rocks, and that
17 somehow opens the door to on redirect, what did
18 someone tell you in 2005 about Daniel Pfankuch,
19 that's my point, Judge. That's simply in
20 comparison to character evidence or 609 evidence,
21 anything like that, that doesn't open the door is
22 my point.

23 We're trying to respect your rulings,
24 Judge, in this area.

25 And I can't emphasize enough, Dr. Mosley,

1 their expert, said it would be dangerous to draw
2 those conclusions. Dr. Lyon testified up here to a
3 reasonable degree of probably of 51 percent. And
4 Dr. Patel said that he could not rule out some
5 other cause of death. Those are the state's
6 doctors. And that's the evidence in this case.

7 And that's the fair and impartial and
8 well-reasoned opinion evidence provided by an
9 expert. And no offense to Detective Diskin, but
10 that's far beyond the scope of his ability to
11 provide those types of opinions.

12 MS. POLK: Your Honor, the testimony in this
13 case is that the prior -- Dr. Lyon has said that
14 the prior incidents would be relevant.

15 I just want to point out if Mr. Kelly
16 does not like the detective's reason for not doing
17 something, he should not pursue that line of
18 questioning. If he's going to ask the detective
19 why he did or did not do something, it clearly
20 opens the door to that detective's reasons.

21 THE COURT: The answer can also be in the
22 fashion that, I did this investigation and I was
23 focused on heat. That really tells it all, doesn't
24 it?

25 MS. POLK: I don't think so, Your Honor.

1 Because it suggests that the detective
2 single-mindedly focused on heat and without the
3 benefit of what are the reasons why you focused on
4 heat. Then it is just another area to attack the
5 detective. You just focused on heat, and you
6 didn't look at other things.

7 There is a reason why he focused on heat.
8 And that's because he interviewed witness going
9 back to 2003 forward. What he focused on was heat
10 and the extreme nature of Mr. Ray's conduct.

11 Again, if Mr. Kelly doesn't want to
12 know -- if he wants to know why the detective did
13 or did not do something, then he needs to be
14 prepared for what this witness is going to say.

15 Again, we ask these witnesses to tell the
16 truth. And this detective did an extensive
17 investigation, reached conclusions that were the
18 result of this extensive investigation. The
19 defense has suggested that early on he focused on
20 Mr. Ray and looked at nothing else. And that's
21 just simply not true.

22 THE COURT: We'll assemble at 8:30.

23 Thank you.

24 (The proceedings concluded.)

25

1 STATE OF ARIZONA)
2) ss: REPORTER'S CERTIFICATE
3 COUNTY OF YAVAPAI)
4

5 I, Mina G. Hunt, do hereby certify that I
6 am a Certified Reporter within the State of Arizona
7 and Certified Shorthand Reporter in California.

8 I further certify that these proceedings
9 were taken in shorthand by me at the time and place
10 herein set forth, and were thereafter reduced to
11 typewritten form, and that the foregoing
12 constitutes a true and correct transcript.

13 I further certify that I am not related
14 to, employed by, nor of counsel for any of the
15 parties or attorneys herein, nor otherwise
16 interested in the result of the within action.

17 In witness whereof, I have affixed my
18 signature this 9th day of May, 2011.

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MINA G. HUNT, AZ CR No. 50619
CA CSR No. 8335

1 STATE OF ARIZONA)
2) ss: REPORTER'S CERTIFICATE
3 COUNTY OF YAVAPAI)
4

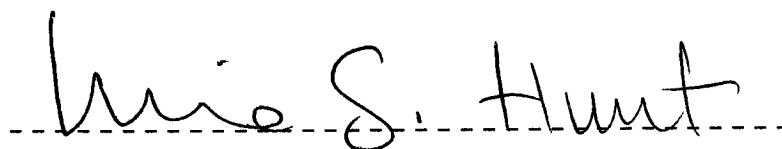
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MINA G. HUNT, AZ CR No. 50619
CA CSR No. 8335